Supreme Court, U.S.
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In The

Supreme Court of the United States

JOAN HALL, *et al.*,

Petitioners

v.

COMMONWEALTH OF VIRGINIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether minority plaintiffs challenging electoral districts under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b), fail to state a vote dilution claim where they allege that members of their minority group have the ability to "elect representatives of their own choice" in a single-member district, but do not allege that their minority group constitutes an arithmetical majority of the population in that district.

LIST OF ALL PARTIES

The names of all Petitioners are: Joan Hall, Leslie Speight, Richard Pruitt, Thomasina Pruitt, Vivian Curry, Eunice McMillan, James Speller, and Robbie Garnes.

The names of all Respondents are: the Commonwealth of Virginia; Jean Jensen, in her official capacity as Secretary of the State Board of Elections; Jerry W. Kilgore, in his official capacity as Attorney General of the Commonwealth of Virginia; Gary Thompson; Charles Brown; James Brown; James Alfred Carey; Evelyn Chandler; Clifton E. Hayes, Jr.; Quentin E. Hicks; Irene Hurst; and Wayne Osmore.

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PETITION FOR A WRIT OF CERTIORARI

Joan Hall and seven other individuals (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 385 F.3d 421 (2004). App., *infra*, 1a-19a. The opinion of the district court is reported at 276 F. Supp. 2d 528 (E.D. Va. 2003). App., *infra*, 22a-44a.

JURISDICTION

The court of appeals entered its judgment on September 22, 2004. App., *infra*, 20a-21a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

As amended in 1982, Section 2 of the Voting Rights Act ("VRA") is violated whenever

> based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

STATEMENT OF THE CASE

1. Factual Background

In the former Fourth Congressional District of Virginia, African-Americans made up 38% of the voting-age population ("VAP"). App., *infra*, 3a. In a special election held on June 19, 2001 – an election marked by relatively low voter turnout and interest because it was held one week after a gubernatorial election – the African-American candidate of choice lost by only 4 percentage points, 52%-48%. App., *infra*, 50a. Given this strong showing by an African-American in a majority-white district that has never elected an African-American Representative, there was good reason to believe that African-Americans had (and continue to have) the ability to elect a candidate of their choice in that district or a similar one with the help of limited yet predictable white crossover voting. App., *infra*, 50a.

In July 2001, Virginia passed a new redistricting plan (the "2001 Plan") that reduced the share of African-American VAP in the new Fourth District from 38% to 32% by reassigning a substantial number of African-American voters from the Fourth District to the Third and Fifth Congressional Districts. App., *infra*, 3a-4a, 49a. The 2001 Plan reduced the percentage of African-Americans in the Fourth District more than any other plan proposed during the redistricting process. App. *infra*, 52a.

In October 2001 and over the opposition of the African-American community, the United States Department of Justice "precleared" the 2001 Plan under Section 5 of the VRA as non-retrogressive.[1] App., *infra*, 50a, 53a; *see* 42 U.S.C. § 1973c. The Justice Department's preclearance did

[1] Due to past racial discrimination, Virginia is a covered jurisdiction under Section 5, 28 C.F.R. § 51.54, and thus must receive preclearance from the Justice Department or the U.S. District Court for the District of Columbia before any new redistricting plans can take effect. 42 U.S.C. § 1973c.

not address the Commonwealth's potential liability under Section 2 for adoption of the 2001 Plan, and in any event, preclearance does not bar Petitioners' Section 2 claim. *See Major v. Treen*, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983) (in suit involving, *inter alia*, Section 2 claims, three-judge district court "conclud[ed] that the Assistant Attorney General's preclearance determination [under Section 5] has no probative value. . . ."); *cf. Morris v. Gressette*, 432 U.S. 491, 506-07 (1977) ("Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation.").

On February 21, 2003, Petitioners[2] filed suit in the United States District Court for the Eastern District of Virginia, claiming that the Commonwealth violated Section 2 by its enactment of the 2001 Plan. App., *infra*, 45a-46a. In their complaint, Petitioners alleged facts that satisfied the pleading requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986).

First, they alleged that African-Americans had the ability to elect a candidate of their choice, even though they constituted only 39.4% of the total population (and 37.8% of the citizen voting-age population) in the previous Fourth District.[3] App., *infra*, 3a, 50a. They alleged this

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[2] The district court later held that seven of nine Petitioners lacked standing to bring a Section 2 claim because they lived outside the newly-drawn Fourth District even though they were residents of the previous Fourth District. App., *infra*, 29a-30a. All but one of the Petitioners dismissed for lack of standing appealed this ruling, but the court of appeals declined to rule on it, stating that the issue was "academic" because two Petitioners (Ms. Hall and Mr. Speight) unquestionably had standing. App., *infra*, 10a n.10. If this Court were to hold that ability-to-elect district claims are not barred under Section 2, then Petitioners would seek to revisit the standing ruling in either the court of appeals or the district court.

[3] Whether total population, voting age population, or citizen voting-age population is the appropriate metric for Section 2 claims, *see Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994), is not relevant in

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ability to elect was demonstrated, at least in part, by the close loss of the African-American candidate of choice in June 2001. App., *infra*, 50a. They also alleged that only a minimal amount of white crossover voting was required for election of African-American candidates of choice. App., *infra*, 50a. In other words, Petitioners were making an "ability-to-elect" district claim under Section 2, not an "influence" district claim.[4]

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this case, since Petitioners' claim does not depend on the choice of metric used. For ease of presentation, this Petition has followed the court of appeals' lead and used VAP shares. *See* App., *infra*, 3a-4a n.3.

[4] An influence district is a district where minority voters are not a majority, and *cannot elect a candidate of their choice*, but can "exert a significant – if not decisive – force in the election process." *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003) (emphasis added). On the other hand, an ability-to-elect district (also known as a "coalitional district," "crossover district," or "performance district") is one where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district *in order to elect candidates of their choice*." *Id.* at 493 (emphasis added). In truth, as discussed *infra*, sometimes less-than-50% minority groups in such districts can elect their candidates of choice without any white crossover votes. An ability-to-elect district claim is more difficult to plead than an influence district claim because for the former, the ability to elect must be pled (and later proven). *See Metts v. Murphy*, 217 F. Supp. 2d 252, 258 (D.R.I. 2002), *vacated by* 363 F.3d 8 (1st Cir. 2004) (*en banc*); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000's*, 80 N.C. L. REV. 1517, 1539-40 (2002) (influence districts are "nebulous and difficult to quantify" whereas ability-to-elect districts, which require the ability to elect, are defined by actual electoral outcomes). Therefore, if a court embraces influence district claims, it necessarily embraces the narrower concept of ability-to-elect district claims. Conversely, a rejection of influence district claims does not imply a rejection of ability-to-elect district claims. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 378, 382-404 (S.D.N.Y. 2004) (refusing to recognize influence dilution claims, yet analyzing the merits of plaintiffs' ability-to-elect district claim), *aff'd w/o op.*, No. 04-218 (Nov. 29, 2004). Because Petitioners are not asserting an influence district claim, they take no position on whether Section 2 prohibits influence district claims. Moreover, Petitioners are not bringing a "minority coalition" claim, where two different minority

(Continued on following page)

Petitioners also alleged that the 2001 Plan "cracked" the Fourth District, which reduced African-American voting strength in the district, and "packed" the Third District, thus wasting numerous African-American votes in the district. App., *infra*, 49a; *see* App., *infra*, 13a-14a n.12 (explaining the concepts of packing and cracking). Petitioners further alleged that the cracking of the Fourth District has deprived African-Americans in the district from having an equal opportunity to elect their candidate of choice. App., *infra*, 51a.

Second, Petitioners alleged that African-Americans in the district voted cohesively. App., *infra*, 50a.

Third, they alleged that there was racial bloc voting in the Fourth District such that politically cohesive white voters usually would defeat the African-American candidate of choice. App., *infra*, 51a.

Fourth, Petitioners alleged specific facts demonstrating that in the totality of the circumstances, African-American votes have been diluted. Such facts included past official racial discrimination in the Fourth District and Virginia as a whole; election-related discrimination; and the marked disparity between African-Americans and whites in housing, education, health care, employment opportunities, and access to the resources needed to participate effectively in the political process. App., *infra*, 52a.

Before discovery started, the Commonwealth and intervenors[5] (collectively "the Commonwealth") moved to dismiss Petitioners' complaint as a matter of law under

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groups are combined and then treated as the equivalent of a single minority group for purposes of *Gingles*' first prong. *See Growe v. Emison*, 507 U.S. 25, 41 (1993).

[5] The intervenors are the Virginia Attorney General and a group of private citizens who claimed the Virginia state defendants would not adequately represent their political interests. *See* App., *infra*, 25a.

Federal Rule of Civil Procedure 12(b)(6). The Commonwealth's motion focused solely on the first *Gingles* prong that, in its view, required Petitioners to allege that a single-member district could be drawn containing an arithmetical majority of African-Americans. App., *infra*, 23a-24a. Petitioners conceded that such a district could not be drawn. App., *infra*, 26a.

2. District Court Opinion

On August 7, 2003, the district court granted the Commonwealth's motion to dismiss. App., *infra*, 24a. The court recognized that Petitioners were making an ability-to-elect district claim, not an influence district claim. App., *infra*, 35a-36a, 39a-40a. The district court also recognized that this Court has not held "that a vote dilution claim could never be brought unless the protected group could constitute a majority." App., *infra*, 36a.

Nevertheless, the district court held that requiring the minority group to be a majority in a new single-member district for Section 2 claims was appropriate to prevent courts from engaging in difficult, subjective political judgments about what percentage of population is necessary to establish a minority group's potential to elect. App., *infra*, 40a-42a. The court also believed that a flat 50% cutoff would avoid interference with a State's exercise of its Congressional redistricting power. App., *infra*, 42a-43a. Thus, the court held that a minority group that was less than an arithmetical majority in a single-member district could not bring a Section 2 vote dilution claim, even if the group could allege an ability to elect. App., *infra*, 43a-44a.

3. Court of Appeals Opinion

On September 22, 2004, a panel of the Fourth Circuit Court of Appeals affirmed. App., *infra*, 2a. The court of appeals first agreed with Petitioners and the district court that Petitioners were bringing an ability-to-elect district

claim, not an influence district claim. App., *infra*, 11a n.11. The court of appeals did not assert that this Court had definitively resolved whether Section 2 prohibits ability-to-elect district claims. *See* App., *infra*, 10a-18a.

Like the district court, the court of appeals then held that a minority group that constituted less than an arithmetical majority in a single-member district has no ability to elect candidates of its own choice under any set of facts, and thus under the first prong of *Gingles* could not bring a Section 2 vote dilution claim. App., *infra*, 13a-14a. The court of appeals framed Petitioners' claim as "a claim that an election law or practice dilutes the voting strength of a multiracial coalition" under Section 2.[6] App., *infra*, 9a. The court of appeals then rejected that claim, holding that to permit such a claim "would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." App., *infra*, 17a-18a. The court of appeals also stated that *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which discussed both ability-to-elect and influence districts in the context of Section 5 of the Voting Rights Act, did not help Petitioners' position. App., *infra*, 19a n.13.

* * *

REASONS FOR GRANTING THE PETITION

The fundamental purpose of the VRA is to ensure full and fair political opportunity for all Americans. *Gingles*, 478 U.S. at 47. Congress amended Section 2 of the VRA in 1982 to ensure that members of minority groups could be on equal political footing with others. As amended, Section 2 prohibits all electoral practices that dilute minority votes. One such practice is destroying or failing to create

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[6] As discussed *infra*, Petitioners dispute this characterization of their claim.

an ability-to-elect district during a redistricting process. An ability-to-elect district is a single-member district where a minority group has the ability to elect a candidate of its own choice – often, but not always, with the help of a limited yet predictable number of white "crossover" voters – even though members of the minority group do not constitute a majority of the population in that district.

Section 2's text, which protects the equal opportunity of minority groups to "elect representatives of their choice" and requires evaluation of vote dilution claims under the "totality of [the] circumstances," does not prohibit ability-to-elect district vote dilution claims. Yet the court of appeals below held that under the first prong of *Gingles*, only minority groups constituting a majority of the population were entitled to bring a Section 2 claim. Given real-world variables such as plurality vote requirements, primary elections, political cohesiveness, and voter turnout, less-than-50% minority groups often do have the ability to elect candidates of their choice. By dismissing their complaint under Federal Rule of Civil Procedure 12(b)(6), the court of appeals never gave Petitioners a chance to prove their ability to elect.

Over the last twenty years, this Court has repeatedly reserved the issue of whether ability-to-elect district claims are barred under Section 2. Courts of appeals, district courts, and scholars are now split over the issue. Some courts, recognizing that a cohesive minority group often does not need an absolute majority of the population to elect its preferred candidate, have held that refusing to recognize such claims is contrary to the text of Section 2, the language and intent of *Gingles*, and will leave minorities underrepresented and without redress. Other courts have read Section 2 and *Gingles* as barring ability-to-elect district claims, worried that without a flat 50% rule, there would be a flood of marginal or frivolous vote dilution cases.

The Justice Department, recognizing the importance of the issue, urged this Court five years ago to decide this issue and hold that ability-to-elect district claims are not prohibited under Section 2. Since then, the issue has increased in importance as the Nation has become more multicultural, giving rise to additional potential ability-to-elect district claims. As the Nation heads toward the 2010 Census and subsequent redistrictings, it has become even more important to resolve the issue, one way or another.

This Court should grant certiorari.

A. Whether Section 2 Forbids Ability-To-Elect District Claims Is An Unsettled Question That Needs Resolution.

In *Gingles*, this Court provided three criteria that are preconditions for a Section 2 violation: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a [proposed] single-member district"; (2) the minority group must be "politically cohesive"; and (3) sufficient majority racial bloc voting must exist such that the majority group (typically, whites) usually defeats the minority group's candidate of choice. 478 U.S. at 50-51. If a plaintiff succeeds on all three *Gingles* prongs, then the court must look at the totality of the circumstances to determine whether minority vote dilution exists in violation of Section 2. *Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994). This Court has noted that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

The issue here implicates *Gingles'* first prong, but is fundamentally a statutory interpretation question: whether Section 2 bars vote dilution claims in single-member districts where the minority group does not make up an arithmetical majority (that is, over 50%) of the

population in that district. This is an unsettled question that requires resolution.

1. This Court Has Deliberately Left The Issue Open.

Over the last twenty years, this Court has consistently held open the question of whether a Section 2 claim is barred where members of a minority group do not constitute an arithmetical majority of the population in a single-member district.

In its first case interpreting the amended Section 2, this Court recognized, but reserved, the issue: "We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district[.]" *Gingles*, 478 U.S. at 46 n.12. Notably, Justice O'Connor, joined by three other Justices, explained in a concurrence that "*if a minority group that is not large enough to constitute a voting majority in a single-member district* can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, *that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.*" *Id.* at 90 n.1 (O'Connor, J., concurring) (emphasis added).

Later, in *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993), this Court "expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." Since influence district claims are easier to plead than ability-to-elect district claims, *Growe*,

by implication, also declined to resolve whether ability-to-elect district claims are impermissible.

In *Voinovich*, this Court assumed that an ability-to-elect district claim was not barred under Section 2:

> [T]he first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today. . . . The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority.* (emphasis added.)

507 U.S. at 158.[7] This Court went on to resolve the Section 2 claim on the basis of the third *Gingles* factor (majority bloc voting). *See id.*

Similarly, in *De Grandy*, this Court assumed that Section 2 ability-to-elect district claims were feasible: "As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases." 512 U.S. at 1008.

Some have suggested that past summary affirmances by this Court of three-judge district court opinions rejecting ability-to-elect district claims mean this Court has already spoken on the issue. *See Parker v. Ohio*, 540 U.S.

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[7] When read in light of *Ashcroft*'s distinction between influence districts and ability-to-elect/coalitional districts, the "influence-dilution claim" in *Voinovich* is actually an ability-to-elect district claim, since the *Voinovich* plaintiffs alleged that African-American voters could elect a candidate of their choice, even though they constituted less than 50% of the population in a single-member district. 507 U.S. at 158.

1013 (2003) (affirming 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio 2003)); *Rodriguez v. Pataki*, No. 04-218 (Nov. 29, 2004) (affirming 308 F. Supp. 2d 346, 404 (S.D.N.Y. 2004)). But in *Parker*, there were alternative grounds with which to affirm the lower court. *See* Juris. Statement, No. 03-411, at *i (Sept. 15, 2003); Motion to Affirm, at *i (Oct. 17, 2003). And in *Rodriguez*, the district court's disapproval of ability-to-elect district claims was dicta because it eventually rejected the plaintiffs' vote dilution claims on other grounds. 308 F. Supp. 2d at 404, 406. In any event, past summary affirmances have little precedential value for this Court. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). Moreover, if this Court's decision in *Parker* truly had decided that Section 2 ability-to-elect district claims were barred, then post-*Parker* decisions would have cited it as controlling authority. That has not happened; in fact, the court of appeals below did not cite *Parker*. *See also Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*) (majority opinion not citing *Parker*; dissenting opinion citing the lower court decision in *Parker*).

2. The Circuit Courts Are Divided.

The federal courts of appeals are divided on whether Section 2 claims are barred as a matter of law for minority groups claiming the ability to elect a candidate of choice without comprising 50% of the population in a single-member district. *Compare Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003) (claims permitted), *vacated and replaced by* 363 F.3d 8 (1st Cir. 2004) (*en banc*) (same) *with Hall v. Commonwealth of Va.*, 385 F.3d 421 (4th Cir. 2004) (claims barred); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999) (same); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372-73 (5th Cir. 1999) (same). The Ninth Circuit has stated in dictum that ability-to-elect district claims might be cognizable under Section 2, at least "in a district where candidates are

elected by plurality." *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989). The Eleventh Circuit, noting this Court's past refusals to decide this issue, has left the question open. *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004).

Courts that have rejected a 50% rule have taken a functional approach to determining a minority population's ability to elect a candidate of choice, which comports with this Court's recognition that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*, 507 U.S. at 158; *De Grandy*, 512 U.S. at 1007 (same). For example, in *Metts*, the *en banc* First Circuit recognized that numerous factors are relevant to determining a minority group's electoral strength: *e.g.*, why the district was changed, how many white crossover voters predictably join with minority voters, how many crossover votes are needed for the minority-preferred candidate to win, "the impact of alternative districts on other minorities," and past minority electoral success. *See* 363 F.3d at 11-12.

Metts is a concrete example of how a minority group can have the ability to elect without comprising a majority in a single-member district. Prior to Rhode Island's 2002 redistricting, the State's only African-American State Senator had been consistently elected in a district that was only 26% African-American. *Metts*, 363 F.3d at 9. After a pre-lawsuit redistricting decreased the African-American population in the district to 21%, the African-American incumbent lost in the primary. *Id.* African-Americans in the district sued and eventually won at the First Circuit the chance to prove their case at trial. The State then settled the case before trial by restoring a 26% African-American population in the district. In the first post-redistricting election, the State's second African-American State Senator was elected in the restored district. *See* http://www.elections.ri.gov/2004GE/SenateDis6.htm; http://www.elections.ri.gov/2004Primary/SenateDis6.htm. Thus,

before and after the dilutional redistricting, the minority community was able to elect the candidate of their choice, even with a population share far lower than that present in this case (26% in *Metts* versus 38% here). In addition, seemingly-small reductions in minority population shares (roughly 5-6% in both *Metts* and this case) have had large impacts on electability of minority-preferred candidates.

By contrast, some courts of appeals have rejected ability-to-elect district claims based simply on a strict reading of *Gingles*' first prong. *See, e.g.*, *Valdespino*, 168 F.3d at 850. Other courts, like the court of appeals in this case, believed that less-than-50% minorities cannot "elect" a candidate of their choice under any set of facts. Some courts claim that a strict 50% cutoff shields courts from meritless claims. *See, e.g., McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942, 943 n.9, 947 (7th Cir. 1988) (in context of analyzing influence district claim).

3. District Courts Are Also Divided.

The lack of clear guidance from federal courts of appeals has led to even less uniformity at the district court level. *Compare Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (ability-to-elect district claims permitted); *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 693-95 (E.D.N.Y.) (same), *appeal dismissed as moot*, 506 U.S. 801 (1992); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (same); *Armour v. Ohio*, 775 F. Supp. 1044, 1051-52 (N.D. Ohio 1991) (same) *with Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 404 (S.D.N.Y. 2004) (ability-to-elect district claims prohibited; dictum), *aff'd w/o op.*, No. 04-218 (Nov. 29, 2004); *Meza v. Galvin*, 322 F. Supp. 2d 52, 64 (D. Mass. 2004) (same) *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 299 (D. Mass. 2004) (same); *Session v. Perry*, 298 F. Supp. 2d 451, 483 (E.D. Tex. 2004) (holding that ability-to-elect district claims were barred under Section 2), *vacated and*

remanded on other grounds, No. 03-1391 (Oct. 18, 2004); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (same), *aff'd w/o op.*, 540 U.S. 1013 (2003);[8] *Turner v. Arkansas*, 784 F. Supp. 553, 569-72 (E.D. Ark. 1991) (same); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 655 (N.D. Ill. 1991) (same).

The district courts that have recognized ability-to-elect district claims use a functional approach in determining whether a minority population has the ability to elect a candidate of choice, focusing on the unique character of each case and requiring a factually-intensive inquiry into "all circumstances that are likely to affect voting behavior and election outcomes. . . . " *Martinez*, 234 F. Supp. 2d at 1322. These courts reject the use of a mechanical numerical cutoff to evaluate a minority group's ability to elect a candidate of choice. *See, e.g.*, *Puerto Rican Legal Def. & Educ. Fund*, 796 F. Supp. at 689 ("[R]esort to absolutes is inappropriate in evaluating minority voting strengths."). Rather, they consider factors that may demonstrate a minority population's ability to elect a candidate of choice, including the extent of voter turnout, voter registration, voting cohesion, white crossover voting, and prior electoral success. *See, e.g.*, *Martinez*, 234 F. Supp. 2d at 1322-23; *Puerto Rican Legal Def. & Educ. Fund*, 796 F. Supp. at 689.

On the other hand, many district courts that impose a flat 50% cutoff (thus disallowing ability-to-elect district claims) opine that it is necessary to avert a flood of "myriad marginal Voting Rights Act claimants likely to jam the courthouse door. . . . " *Hastert*, 777 F. Supp. at 654. Some courts assert that the recognition of ability-to-elect districts would extend Section 2's protection of minorities to the protection of groups linked by political affiliation.

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[8] One judge dissented from this aspect of *Parker*, arguing that ability-to-elect district claims were not barred under Section 2. *Parker*, 263 F. Supp. 2d at 1109 (Gwin, J., concurring).

Session, 298 F. Supp. 2d at 483-84. Still others rely solely on perceived judicial consensus. *See Parker*, 263 F. Supp. 2d at 1105.

4. Most, But Not All, Commentators Support Ability-To-Elect District Claims.

Most commentators believe that ability-to-elect district claims are not prohibited under Section 2 or *Gingles*. They agree that a functional approach to determining whether a minority group has the ability to elect a chosen candidate, rather than using a 50% population cutoff as a proxy, is more consistent with the language and policies of the VRA. *See, e.g.*, Pildes, *supra*, at 1554-56; Bernard Grofman *et al.*, *What Minority Populations Are Sufficient to Afford Minorities a Realistic Chance to Elect Candidates of Choice? Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1385, 1388-90, 1423 (2001); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 437-38 (2000); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2606-08 (2004).

At least one commentator disagrees, however. *See* Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389, 391-93, 398-99 (arguing that recognition of ability-to-elect district claims violates the purposes behind the VRA because it impermissibly shifts the focus from historically oppressed racial minorities to multiracial coalitions joined not by race, but by common ideas, values, and political goals).

B. This Is The Right Case At The Right Time To Address This Important Issue.

1. This case comes to this Court after being dismissed as a matter of law, with all facts in the complaint assumed to

be true. App., *infra*, 9a-10a. Accordingly, this case presents a pure question of statutory construction for this Court to resolve.

2. Whether ability-to-elect district claims are forbidden under Section 2 has been unsettled for the last two decennial redistrictings. *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (post-2000 redistricting); *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (post-1990 redistricting). As already discussed, the issue has percolated in numerous courts at all levels and has been discussed extensively in academic commentary. The Justice Department also believes that the issue can be decided now without further consideration by lower courts. *See* Brief for the United States as *Amicus Curiae*, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, No. 98-1987 (Dec. 17, 1999) ("*Valdespino* Amicus Brief"), at 6 (urging review).

Trying to resolve unsettled legal issues too close in time to an election or redistricting may result in no decision at all. *See Spencer v. Pugh*, Nos. 04A360, 04A364, 125 S. Ct. 305 (2004) (Stevens, J., Circuit Justice) (denying applications to vacate election-related stays because "the hour is late and time is short"). Therefore, it is now time for this Court to decide this important Section 2 issue, which has been left open since *Gingles*.

3. Ability-to-elect district claims under Section 2 have been asserted more frequently in recent years. For instance, in 2004 alone federal courts have decided six cases that involved ability-to-elect district claims. *See Hall*, 385 F.3d at 421; *Metts*, 363 F.3d at 8; *Meza*, 322 F. Supp. 2d at 52; *Rodriguez*, 308 F. Supp. 2d at 346; *Black Political Task Force*, 300 F. Supp. 2d at 291; *Session*, 298 F. Supp. 2d at 451. This is the highest number in any year since the Court left the issue open in *Gingles*. It is likely that the number of such cases will continue to increase. Ability-to-elect district vote dilution claims are a natural result of our increasingly-multicultural society, wherein minorities' voting strength will often – not always, but often – be a

function of their ability to form effective coalitions with other groups.[9] *See* Grofman *et al.*, *supra*, at 1392 (discussing the effect of Hispanic populations on African-Americans' ability to elect); *see also* Carol M. Swain, *Race and Representation*, THE AMERICAN PROSPECT A11, A13 (June 2004) (discussing the importance of coalitions in America's new multiracial society).

Yet, even as minority voting power becomes increasingly dependent on minority groups' ability to form coalitions, legislative bodies and courts are increasingly uncertain about their obligations to form such coalition districts when engaging in redistricting. *See, e.g., Wilson v. Eu*, 823 P.2d 545, 549 (Cal. 1992) (noting the "present uncertainties concerning the scope and intent of the [Voting Rights] act."). As a result of this continuing uncertainty, it is not uncommon for the redistricting process to entail extensive (and unquestionably expensive) proceedings – and, as noted above, subsequent litigation. *See generally id.* at 547-50 (discussing the protracted process of redistricting in California following the 1990 Census).

By granting the instant petition and addressing squarely the issue of ability-to-elect districts, this Court will reduce this uncertainty and subsequent litigation, regardless of this Court's ultimate holding on the merits. If this Court holds that ability-to-elect district claims are not barred under Section 2, then state legislatures and other redistricting bodies will know that such districts are permissible (and in some circumstances, required) to avoid Section 2 liability, and will be more likely to create such districts. This should reduce the amount of Section 2

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[9] Petitioners emphasize the type of "coalitions" at issue in ability-to-elect districts usually involve a sizable, although not 50%, minority population and a small, reliable white population that would vote for the minority group's preferred candidate. This means that minority voters have an "effective majority" in such districts and can elect *their* candidate of choice.

litigation brought by less-than-50% minority groups. On the other hand, barring ability-to-elect district claims will also reduce or eliminate the amount of Section 2 litigation brought by less-than-50% minority groups.

4. Thus, whether Section 2 plaintiffs must always show that their minority group is a majority of the population in a single-member district is an issue of recurring significance in the administration and enforcement of Section 2, which applies nationwide. Resolving this issue will provide needed direction to the Nation's courts and legislators in advance of the next decennial census in 2010.

C. The Court Of Appeals Was Wrong To Disallow Ability-To-Elect District Claims As A Matter Of Law.

1. Section 2's Language Supports Such Claims.

Nothing in the language of Section 2 states that the "protected minority class of citizens" must constitute more than 50% of the relevant population in a proposed district. Rather, all that is necessary is a showing, by the totality of the circumstances, that the minority group's members lack equal opportunity "to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), and that a differently-drawn redistricting map could remedy the problem. Nevertheless, the court of appeals in this case misinterpreted the "opportunity . . . to *elect*" language in Section 2 as the basis for its mechanical imposition of a 50% cutoff. App., *infra*, 13a-16a (emphasis added). This is wrong for three primary reasons:

First, "elect" does not necessarily require winning an election with over 50% of the population (however defined) in a jurisdiction. Rather, the term typically means that a candidate has been chosen for office by receiving the most votes – the number of people in the voting pool is usually irrelevant. *Cf.* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 400 (1983) (defining "elect" only as "to select by

vote for an office, position, or membership"); J. Morgan Kousser, *Beyond Gingles: Influence Districts & The Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 563-68 (1993) (noting that numerous factors can affect whether a smaller-than-majority group constitutes an effective voting majority). Indeed, this Court has often recognized in both the Section 2 and Section 5 contexts that less-than-50% minority groups can "elect" candidates of their choice, sometimes (but not always) with the support of limited yet reliable white crossover voting. *See Voinovich*, 507 U.S. at 158 Section 2; *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring) (same); *Ashcroft*, 539 U.S. at 480 (majority op.), 492 (Souter, J., dissenting) (Section 5); *City of Rome v. United States*, 446 U.S. 156, 183-84 (1980) (same).

Second, structural election factors can affect whether less-than-50% groups can elect their candidate of choice. For instance, in Virginia, political candidates – both in primary and general elections – may be elected by a plurality vote, not an outright majority. *See* Va. Code Ann. § 24.2-673 ("the person having the highest number of votes for any office shall be deemed to have been elected to such office"). This is true in all states for federal elections and a majority of states for all elections. *See* Congressional Research Service Report for Congress, *Voting Technologies in the United States*, at 1 n.2 (2001); Benjamin Ginsberg, *Election* § V ¶ 1 ("Virtually all national elections in the United States use the plurality system, although the majority system survives in some primary, state, and local elections, especially in Southern states."), *available at* http://encarta.msn.com/text_761569491_0/Election.html. Thus, depending on the number of candidates, less-than-50% minority groups in "plurality states" like Virginia have the ability to elect, as the Ninth Circuit has noted. *See Romero*, 883 F.2d at 1424 n.7.

In addition, in a traditional primary election, a winning candidate need not receive 50% of his or her votes from the entire district; rather, the candidate just needs to

receive 50% from voters who voted in that primary (and if plurality election laws apply, then often much less than 50% suffices). In many districts, minorities constitute a significant majority of a particular political party, and that party has a majority of registered voters in such districts. Accordingly, minority voters in such districts could control the party primary and then count on a limited amount of white crossover voting – despite an overall pattern of racially polarized white bloc voting – to elect candidates of their choice. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1298-99, 1315 (S.D. Fla. 2002); *Page v. Bartels*, 144 F. Supp. 2d 346, 356 (D.N.J. 2001); Grofman *et al.*, *supra*, at 1410-11; Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2219 (2003). This further demonstrates that depending on the facts, less-than-50% minority populations can "elect" a candidate of their choice.

Third, other variables, such as voter turnout and political cohesion within groups, also affect the percentage of votes needed to elect a representative. "Which candidate wins is a function not only of the proportion that minority voters form of the active electorate, but also of the levels of cohesion among the two groups of voters." Kousser, *supra*, at 563. For instance, in a jurisdiction that is 30% minority and 70% white, the minority-preferred candidate will prevail if there is minority cohesion (*i.e.*, minority members vote together for the same candidate) of 90% and white cohesion of 60%. *See id.* at 563. And if voter turnout varies by race (*e.g.*, it is higher in the minority group than for whites), then minority voters are even more likely to be able to elect their candidate of choice without constituting an arithmetical majority of the population in a single-member district. *See id.* at 563-65. In fact, under certain factual circumstances, less-than-50% minority groups could have the ability to elect without *any* white crossover voting.

The above argument is not based on supposition, but on actual statistical evidence. This evidence demonstrates that minorities often do not need to constitute a numerical majority to elect their candidate of choice. *See* Pildes, *supra*, at 1527-39; Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1222-23 (1999); Charles Cameron *et al.*, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 808 (Dec. 1, 1996); Richard Vallely, THE AMERICAN PROSPECT 43 (Sept. 1999-Oct. 1999).

In short, because the ability to elect is dependent on more than raw population percentages, a court must assess a minority group's ability to elect under the fact-specific "totality of circumstances" standard, which Congress put into the statute in 1982. Ability-to-elect district claims therefore are not barred under Section 2. Since this conclusion flows directly from the text of the statute, this Court's inquiry should be at an end. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotation marks omitted).

2. Section 2's Legislative History Sets A Flexible, Fact-Specific Standard For Vote Dilution Claims.

If the language of the amended Section 2 is deemed ambiguous, then this Court can look to the legislative history of the 1982 amendments to the VRA for direction. *See, e.g., Gingles*, 478 U.S. at 43-46 (interpreting Section 2 in light of the legislative history); *McDaniel v. Sanchez*,

452 U.S. 130, 148 n.25 (1981) ("Because the 1975 extension of the Voting Rights Act is the controlling statute in this case, the legislative history of that extension is of particular relevance.") (citation omitted); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("[O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose.").

The Senate Report ("Report") accompanying the 1982 amendments to the VRA is the definitive legislative history for the amended Section 2. *Gingles*, 478 U.S. at 43-44 & n.7 (relying heavily on the Report). The Report explains that Section 2 of the VRA was amended in order to restore the legal standard governing voting discrimination cases before this Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. No. 97-417, at 2, 15, *reprinted in* 1982 U.S.C.C.A.N. 177. Specifically, Congress intended to clarify that a determination of voting discrimination depends on the overall effect or "result" of the challenged political practice on the minority group in question, not on the presence of discriminatory intent underlying that practice, as a plurality of the *Bolden* court had held. *Id.* at 15-16. Under this "results test," a plaintiff demonstrates a violation of Section 2 where "the challenged system or practice, *in the context of all the circumstances* in the jurisdiction in question, results in minorities being denied equal access to the political process." *Id.* at 27 (emphasis added).

The Senate Report makes clear that this results test necessitates a fact-intensive analysis that often turns on jurisdiction-specific facts; no single factor was meant to be dispositive. *See id.* at 27-29. Indeed, the Report emphasizes that vote discrimination cases should be decided without "mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances." *Id.* at 31.

Given this emphasis, to impose a greater-than-50% minority group requirement – or any other numerical cutoff or formula, for that matter – would violate the Report's prohibition against "mechanistic rules." Accordingly, the Report supports a flexible, fact-specific standard for all aspects of the Section 2 analysis. The question is whether minority voters have the ability to elect someone of their choice, not whether they meet an arbitrary 50% cutoff.

3. The Department Of Justice Supports Ability-To-Elect District Claims.

The United States Department of Justice, an agency with vast experience litigating and administering the Voting Rights Act, has consistently interpreted Section 2 and *Gingles* to permit ability-to-elect district claims. This position has remained the same under both Republican and Democratic Administrations, in *amicus curiae* briefs in both lower courts and this Court, and regardless of the minority group seeking relief. The Justice Department's views are worthy of deference, especially given the Attorney General's role in drafting and shaping the VRA. *United States v. Bd. of Comm'rs*, 435 U.S. 110, 131 (1978).

The Justice Department stated its views on this issue most plainly in the *amicus curiae* brief submitted at this Court's invitation in *Valdespino v. Alamo Heights Independent School District*, *supra*. The Justice Department first noted that the key inquiry for the first *Gingles* factor is whether minority voters have the "potential to elect representatives of their choice." *Valdespino* Amicus Br., *supra*, at 10. Although a district comprising over 50% minority voters is *sufficient* to achieve this goal, it is not *necessary* because a "variety of circumstances may give a minority voting population that is compact, politically cohesive and substantial in size yet just short of a majority the potential to elect a representative of its choice." *Id.* at 11. Contrary to the court of appeals' opinion below, the

candidate of choice here is the *minority group*'s candidate of choice, not a "multiracial coalition['s]" candidate of choice. *See* App., *infra*, 9a.

The Justice Department also argued that a strict 50% cutoff is based on the faulty assumption that a Section 2 claim requires that "no white voter will ever vote for the candidate preferred by the minority." *Valdespino* Amicus Br., *supra*, at 11. In the Justice Department's experience, however, "that is almost never the case; although racially polarized voting does in some places reach extreme degrees, it is rarely if ever total." *Id.* Even where voting in a particular jurisdiction is racially polarized, "nonetheless there may be a small amount of consistent crossover voting from the majority (or from a different racial or language minority in the district) that would give the minority voters the potential to elect their representative of choice." *Id.* Such limited yet predictable majority crossover voting permits plaintiffs to satisfy both the first *Gingles* prong (ability to elect in a reasonably compact single-member district) and the third *Gingles* prong (majority bloc voting). *Id.* at 12 n.3.

Finally, the Justice Department highlighted that the other *Gingles* preconditions – political cohesion and majority bloc voting – "do not lend themselves to strict numerical cutoffs, but rather require the application of judgment to the facts of each case. . . . " *Id.* at 13. There is no reason why a similar approach could not be applied to an assessment of whether a minority population was sufficiently large (although not a numerical majority) to be able to elect a representative. *Id.*

It is significant that the Justice Department has endorsed ability-to-elect district claims on multiple occasions, both in this Court and in the lower federal courts. *See Valdespino* Amicus Br., *supra*; Opening and Reply Briefs for the United States, *Bush v. Vera*, No. 94-805, 517 U.S. 952 (1996); Brief for the United States As *Amicus Curiae*, *Campos v. City of Houston*, 113 F.3d 544 (5th Cir.

1997); Brief for the United States, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *but see* Brief for the United States As *Amicus Curiae*, *Voinovich v. Quilter*, No. 91-1618, 507 U.S. 146 (1993).

This Court should give respect to the Justice Department's considered views and hold that Section 2 does not prohibit ability-to-elect district claims.

4. That Section 2 Does Not Bar Ability-To-Elect District Claims Is Consistent With This Court's Decision In *Georgia v. Ashcroft*.

This Court has recognized the value of ability-to-elect districts as a means of strengthening minority voting power and preventing racial balkanization. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), this Court assessed whether Georgia's redistricting plan for the State Senate, which unpacked minority-majority districts and distributed minority voters more evenly throughout more districts, violated Section 5 of the VRA. This Court held that States covered by Section 5 can fulfill their obligations under the statute by forming ability-to-elect districts, or even by forming influence districts. *Id.* at 482-83.

Although *Ashcroft* endorsed ability-to-elect and influence districts in the Section 5 context, the decision has bearing in the Section 2 arena. *See generally Chisom v. Roemer*, 501 U.S. 380, 401 (1991) (noting the close connection between Section 2 and Section 5, at least for some purposes). First, all nine Justices recognized that minority voters can "elect" candidates of their choice even if they are not a majority within a single district. *See Ashcroft*, 539 U.S. at 480 (majority op.), 492 (Souter, J., dissenting). They also recognized that courts are capable of making this "ability to elect" determination without aid of an arbitrary numerical cutoff. *See id.* at 480 (majority op.); *id.* at 492 (Souter, J., dissenting). That has direct relevance to the issue at bar.

Second, it is illogical that a court may consider ability-to-elect districts as a defense to Section 5 liability under *Ashcroft*, but cannot impose them as a remedy for Section 2 liability. It makes sense that the creation of such a district would also be a cognizable *remedy* for a violation of the Act, since the underlying concern in both circumstances is to ensure that minority voters with the potential "to participate in the political process *and to elect representatives of their choice*," 42 U.S.C. § 1973(b) (emphasis added), actually have an opportunity to be equal members in American political life. This parallelism is consistent with the language and intent of Section 2 and *Gingles*.

At least two courts have viewed *Ashcroft* as support for holding that ability-to-elect district claims under Section 2 are not prohibited. *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003), *vacated and replaced by* 363 F.3d 8 (1st Cir. 2004) (en banc); *McNeil v. Legis. Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003) (recognizing broader concept of influence district claims, which includes ability-to-elect district claims), *cert. denied*, 124 S. Ct. 1068 (2004). Similarly, some federal and state courts have recognized the usefulness of ability-to-elect districts as a defense against Section 2 liability. *See, e.g., Page v. Bartels*, 144 F. Supp. 2d 346, 363-365 (D.N.J. 2001); *In re Senate Joint Resolution 2G, Special Apportionment*, 597 So. 2d 276, 284 (Fla. 1992) (districts with over 40% African-American populations "provide blacks with an effective opportunity to elect representatives of their choice."). As discussed above, this weighs in favor of permitting affirmative ability-to-elect district claims under Section 2.

5. The Recognition Of Ability-To-Elect District Claims Will Not Open The Floodgates To Frivolous Claims.

Allowing plaintiffs to assert ability-to-elect district claims will not drown the courts in frivolous Section 2

claims. Plaintiffs would still be required to plead facts for the second and third *Gingles* prongs, and for the totality of the circumstances factors. "Marginal" claims may easily be rejected on these grounds. Moreover, plaintiffs alleging ability-to-elect district claims remain bound by Federal Rule of Civil Procedure 11. In other words, only those minority groups which can allege in good faith that they have the ability to elect representatives of their choice can proceed with their claims.

Even if plaintiffs survive the pleading stage, they must then prove at the summary judgment stage, and perhaps later at trial, their alleged ability to elect with probative, jurisdiction-specific evidence. *Gingles* requires a district court to conduct a "searching practical evaluation of the past and present reality" for all aspects of Section 2 claims. The district court is then to use its "familiarity with the indigenous political reality" to conduct "an intensely local appraisal" of the likely impact of the challenged electoral plan. *See* 478 U.S. at 45, 79 (internal quotation marks omitted) (citing S. Rep. No. 97-417, at 28-30, 36-37). This fact-intensive, case-by-case approach mandated by Congress will prevent frivolous Section 2 claims.

Finally, federal courts have a great deal of experience in assessing vote dilution claims under Section 2, and are adept at making factual judgments with respect to population statistics and voting patterns. *See Valdespino* Amicus Br., *supra*, at 12 n.3 ("[T]he lower courts have accumulated considerable experience in making judgments about racially polarized and bloc voting and are able to distinguish between fact patterns in which racially polarized, bloc voting exists and those in which it does not exist."); S. Rep. No. 97-417, at 16 ("The 'results' test to be codified in Section 2 is a well defined standard. . . . This test will provide ample guidance to federal courts when they are called upon to review the validity of election laws and procedures challenged under Section 2."). Likewise, courts

are able to determine whether a less-than-50% minority group has the ability to elect a candidate of its choice.

6. Allowing Ability-To-Elect District Claims Makes Sense As A Policy Matter.

"The Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and colorblindness are not just qualities to be proud of, but are simple facts of life." *Ashcroft*, 539 U.S. at 490-91. Requiring ability-to-elect districts to be created or maintained when necessary to provide equal opportunity for minority groups is a practical measure that accounts for the realities of politics in America, encourages integration and cooperation between races, and helps create a more colorblind society.

First, permitting ability-to-elect district claims under Section 2 will naturally create or maintain additional ability-to-elect districts, either through litigation or legislation. *See supra* section B.3. As this Court recognized in *Ashcroft*, such districts help reduce racial balkanization while at the same time permitting historically-disempowered minority groups to exercise their fair share of political power. 536 U.S. at 481-82; *see also* Pildes, *supra*, at 1548. This is exactly what the VRA was designed to do.

Second, in an ability-to-elect district, cooperation among racial groups is encouraged, especially in order for a minority candidate to win.[10] This forces minority groups to work with majority groups to "pull, haul, and trade to find common political ground," and forces elected officials

[10] As stated *supra*, such cooperation is not always necessary, since under the right factual circumstances, less-than-50% minority groups can elect their candidates of choice without any majority crossover voters.

to represent their entire constituency, rather than a particular racial group. *See De Grandy,* 512 U.S. at 1020; *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

Third, disallowing ability-to-elect district claims gives redistricting bodies freedom to pack minority voters unnecessarily into majority-minority districts whenever possible, and to withdraw all legal protection for ability-to-elect districts that cannot be converted to majority-minority districts. These perverse results improperly elevate race to an "all or nothing" proposition in redistricting. Such packing of minority voters into one district also makes a *Shaw*-based Equal Protection Clause challenge more likely. *See generally Bush v. Vera*, 517 U.S. 952, 995 (1996) (O'Connor, J., concurring); *Shaw*, 509 U.S. at 648-50.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 21, 2004

APPENDIX A

JOAN HALL; RICHARD PRUITT; THOMASINA PRUITT; VIVIAN CURRY; EUNICE MCMILLAN; JAMES SPELLER; ROBBIE GARNES; LESLIE SPEIGHT, Plaintiffs-Appellants, and ELIJAH SHARPE, Plaintiff, v. COMMONWEALTH OF VIRGINIA; JEAN JENSEN, Secretary, State Board of Elections, in her official capacity; JERRY W. KILGORE, in his official capacity as Attorney General of the Commonwealth of Virginia; GARY THOMPSON; CHARLES BROWN; JAMES BROWN; JAMES ALFRED CAREY; EVELYN CHANDLER; CLIFTON E. HAYES, JR.; QUENTIN E. HICKS; IRENE HURST; WAYNE OSMORE, Defendants-Appellees.

No. 03-2113

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

385 F.3d 421; 2004 U.S. App. LEXIS 19828

May 4, 2004, Argued
September 22, 2004, Decided

COUNSEL: J. Gerald Hebert, Alexandria, Virginia, for Appellants.

Michael A. Carvin, JONES DAY, Washington, D.C.; Edward Meade Macon, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees.

ON BRIEF: Donald L. Morgan, CLEARY, GOTTLIEB, STEEN & HAMILTON, Washington, D.C.; Anita S. Earles, UNCCENTER FOR CIVIL RIGHTS, Chapel Hill, North Carolina, for Appellants.

Jerry W. Kilgore, Attorney General of Virginia, Judith Williams Jagdmann, Deputy Attorney General, James C. Stuchell, Assistant Attorney General, Richmond, Virginia; Louis K. Fisher, Shay Dvoretzky, Cody R. Smith, JONES DAY, Washington, D.C., for Appellees.

JUDGES: Judge Duncan wrote the opinion, in which Judge Niemeyer and Judge Shedd joined. Before NIEMEYER, SHEDD, and DUNCAN, Circuit Judges.

OPINION BY: Duncan

OPINION: DUNCAN, Circuit Judge:

At issue in this lawsuit under Section 2 of the Voting Rights Act of 1965, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973 (2003)), is whether minority plaintiffs, who are not sufficiently numerous to form a voting majority in any single-member district in the Commonwealth of Virginia, may nevertheless claim that a legislative redistricting plan denies minority voters an equal opportunity to elect candidates of their choice. The district court dismissed the complaint on the grounds that the plaintiffs could not satisfy the requirement established in *Thornburg v. Gingles* that a minority group seeking relief under Section 2 "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. 30, 50, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). Because we agree that *Gingles* establishes a numerical majority requirement for all Section 2 claims, we affirm the order of the district court dismissing the complaint with prejudice.

I.

On June 19, 2001, the Commonwealth held a special election for the United States House of Representatives seat in the Fourth Congressional District. The seat had become vacant on account of the death of longtime Democratic Representative Norman Sisisky on March 29, 2001. In the special election, Republican Randy Forbes defeated Democrat Louise Lucas to capture the Fourth District seat by a 52 to 48 percent margin.

Shortly thereafter, on July 10, 2001, the Virginia General Assembly enacted the existing congressional district plan (the "2001 Redistricting Plan") based on the results of the 2000 census.[1] Relevant to this appeal, the 2001 Redistricting Plan redrew the boundaries of the Fourth District, shifting a number of black[2] citizens out of the Fourth District and into the Third and Fifth Congressional Districts. Before the enactment of the 2001 Redistricting Plan, blacks formed 39.4 percent of the total population and 37.8 percent of the voting-age population in the Fourth District.[3] In the reconfigured Fourth District,

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[1] The 2001 Redistricting Plan was duly signed into law by the Governor of Virginia and is codified at Va. Code Ann. § 24.2-302.1 (Michie 2004). The Department of Justice precleared the enacted plan pursuant to Section 5 of the Voting Rights Act, which requires a showing that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ." 42 U.S.C. § 1973c.

[2] For the purposes of this opinion, we use the terms "minority" and "black" interchangeably.

[3] The complaint provides only the total population statistics for the relevant congressional districts. Voting-age population statistics, however, are publicly available on the official redistricting website of the Virginia Division of Legislative Services. We may properly take judicial notice of this information in reviewing the dismissal of the

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blacks constitute 33.6 percent of the total population and 32.3 percent of its voting-age population.

The 2001 Redistricting Plan left the total population and voting-age population figures for blacks in the Third District virtually unchanged. The Third District previously had a total black population of 57 percent and a black voting-age population of 53.3 percent. Under the new plan, blacks in the Third District comprise 56.8 percent of the total population and 53.2 percent of the voting-age population. Similarly, the total population and voting-age population statistics for blacks in the Fifth District were largely unaffected by the 2001 Redistricting Plan. Blacks constituted 24.3 percent of the total population in the Fifth District both before and after the enactment of the plan. Black voting-age population, however, saw a slight increase from 22.7 percent in the former Fifth District, to 22.8 percent in the redrawn Fifth District.[4]

The plaintiffs are nine registered voters who either currently reside in the Fourth District or were shifted out of the Fourth District as a result of the 2001 Redistricting Plan. On February 21, 2003, the plaintiffs filed a federal complaint in the Eastern District of Virginia alleging that the reconfiguration of the Fourth District dilutes minority voting strength in violation of Section 2 of the Voting

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complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Papasan v. Allain*, 478 U.S. 265, 268 n. 1, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record. . . .").

[4] No explanation appears on the face of the record as to why the 2001 Redistricting Plan did not result in greater population changes in the Third and Fifth Districts.

Rights Act.[5] More precisely, the complaint alleges that, in the former Fourth District, blacks were sufficiently numerous to combine with white voters and thereby elect their preferred candidates to public office. The plaintiffs contend that, in the newly-drawn Fourth District, blacks are too small in number to form the same winning coalition with "crossover"[6] white voters that existed before the enactment of the 2001 Redistricting Plan. The complaint further alleges that the new plan dilutes minority voting strength in the Fourth District by shifting black voters out of the Fourth and into the Third District. According to the plaintiffs, the reassignment of black voters to this already safe majority-minority district[7] amounts to an unnecessary

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[5] Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides that: (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section. (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[6] "Crossover" voters are persons outside a minority group who support the minority group's candidate in an election. *See Gingles,* 478 U.S. at 56.

[7] A majority-minority district is a legislative district "in which a majority of the population is a member of a specific minority group."

(Continued on following page)

waste of black votes. As affirmative relief, the plaintiffs requested an order: (1) declaring that the 2001 Redistricting Plan dilutes minority voting strength in violation of Section 2; (2) enjoining the defendants from conducting any elections in the Fourth District under the 2001 Redistricting Plan; and (3) restoring the Fourth District to approximately 40 percent in total black population.

Relying on the Supreme Court's decision in *United States v. Hays,* 515 U.S. 7371, 132 L. Ed. 2d, 115 S. Ct. 243 635 (1995), the district court dismissed for lack of standing the seven plaintiffs who no longer reside in the Fourth District as a result of the 2001 Redistricting Plan. The *Hays* Court held that plaintiffs who do not live in a challenged district lack standing to claim that the district has been racially gerrymandered in violation of the Fourteenth Amendment. *Id.* at 744-45 ("Where a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment . . . and therefore has standing to challenge the legislature's action."). Although *Hays* concerned a racial gerrymandering claim under the Equal Protection Clause, rather than a vote dilution claim under Section 2 of the Voting Rights Act, the district court was persuaded that the principles of standing discussed in *Hays* apply equally to the seven plaintiffs in this case who do not live in the challenged district, and thus can claim no more than a "'generalized grievance against governmental conduct of which [they] do [] not approve.'" *Hall v. Commonwealth of Va.,* 276 F. Supp. 2d 528, 531 (E.D. Va. 2003) (quoting *Hays,* 515 U.S. at 745). Accordingly, the district court held that only Plaintiffs Joan Hall and Leslie

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Voinovich v. Quilter, 507 U.S. 146, 149, 122 L. Ed. 2d 500, 113 S. Ct. 1149 (1993).

Speight have standing to challenge the newly-drawn Fourth District "by virtue of their residency within the Fourth District." *Id.* at 531-32.

The district court ultimately dismissed the vote dilution claims of Hall and Speight on the grounds that they failed to satisfy all of the "necessary preconditions" for a Section 2 claim established by the Supreme Court in *Thornburg v. Gingles,* 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). The *Gingles* Court construed Section 2 in the context of a lawsuit claiming that the election of candidates from a multimember district[8] diluted minority voting strength by submerging a cohesive racial minority group within a bloc-voting white majority. The Court held that plaintiffs challenging the use of multimember districts under Section 2 must first establish three threshold conditions. The minority group must be able to (1) "demonstrate that it is sufficiently large and compact to constitute a majority in a single member district," (2) "show that it is politically cohesive," and (3) "demonstrate that the white majority votes sufficiently as a bloc to enable it . . .

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[8] Vote dilution challenges to legislative districts can arise either in the case of "single-member" or "multimember" districts. The single-member district "is the smallest political unit from which representatives are elected." *Gingles,* 478 U.S. at 50 n. 17. In these districts, one candidate is elected to represent voters in the district. By contrast, in multimember districts, "two or more legislators [are] elected at large by the voters of the district." *Whitcomb v. Chavis,* 403 U.S. 124, 127-28, 29 L. Ed. 2d 363, 91 S. Ct. 1858 (1971). Because of the greater size of multimember districts, a minority group "may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts." *Rogers v. Lodge,* 458 U.S. 613, 616, 73 L. Ed. 2d 1012, 102 S. Ct. 3272 (1982).

usually to defeat the minority's preferred candidate." *Id.* at 50-51.[9]

Proof of the *Gingles* preconditions is not alone sufficient to establish a claim of vote dilution under Section 2. "The ultimate determination of vote dilution under the Voting Rights Act still must be made on the basis of the 'totality of the circumstances.'" *Lewis v. Alamance County,* 99 F.3d 600, 604 (4th Cir. 1996) (internal quotations omitted). On the other hand, the failure of a minority group to satisfy all of the *Gingles* preconditions means that it cannot sustain a claim under Section 2 that the challenged electoral practice "impede[s] the ability of minority voters to elect representatives of their choice." *Gingles,* 478 U.S. at 48. After analyzing the vote dilution allegations in the complaint, the district court held that Hall and Speight failed to state a claim cognizable under Section 2, since blacks would not form a population or voting-age majority in the Fourth District even if they prevailed and the Fourth District was restored to approximately 40 percent in total black population. The district court therefore dismissed the complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On appeal, the plaintiffs claim that the district court erred in treating the first *Gingles* precondition as "a bright-line numerical cut-off requiring black voters to be a

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[9] The *Gingles* preconditions are equally applicable in vote dilution challenges to single-member legislative districts. *See Johnson v. De Grandy,* 512 U.S. 997, 1006, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994) (applying *Gingles* preconditions in a single-member district dilution suit); *see also Growe v. Emison,* 507 U.S. 25, 40, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993) (same).

numerical majority in a single-member district." Appellants' Br. at 8. Although *Gingles* states very clearly that Section 2 plaintiffs must demonstrate that a minority group is large enough to form "a majority" in a district, *Gingles,* 478 U.S. at 50, the plaintiffs argue that nothing in the language of Section 2 or *Gingles* requires that a minority group constitute a *numerical* majority in a district in order to state a vote dilution claim. Instead, the plaintiffs contend that the first *Gingles* precondition is satisfied not only when a minority group constitutes a numerical majority in a single-member district, but also when minorities are sufficiently numerous to form an "effective" or "functional" majority in a single-member district by combining with voters from other racial or ethnic groups. Appellants' Br. at 28. According to the plaintiffs, the purpose of Section 2 is to remove obstacles that impair the ability of minorities to elect their preferred candidates. Thus, they argue that if minorities can elect a candidate by forming a majority in a single-member district in combination with voters from another racial group, "then they have demonstrated that a structure which prevents them from doing so is dilutive." *Id.* at 22. Fundamentally, the plaintiffs contend that Section 2 authorizes a claim that an election law or practice dilutes the voting strength of a multiracial coalition.

II.

We review de novo the dismissal of a complaint under Rule 12(b)(6), *Franks v. Ross,* 313 F.3d 184, 192 (4th Cir. 2002), which authorizes the dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6). Because the purpose of Rule 12(b)(6) is to test the legal sufficiency of a complaint,

rather than the facts alleged in support of it, we "must accept as true all well-pleaded allegations and must construe the factual allegations in the light most favorable to the plaintiff." *Randall v. United States,* 30 F.3d 518, 522 (4th Cir. 1994). Ultimately, a complaint should not be dismissed under Rule 12(b)(6) "unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1993). With these principles in mind, we consider whether the complaint states a valid claim under Section 2.[10] However, before turning to the merits of the plaintiffs' appeal, we set forth below the concepts that give meaning to a vote dilution claim, as well as the standards that keep it "within principled legal bounds." *McGhee v. Granville County,* 860 F.2d 110, 116 (4th Cir. 1988).

III.

A.

A vote "dilution" claim alleges that a particular practice operates "to cancel out or minimize the voting strength" of a minority group. *White v. Regester,* 412 U.S. 755, 765, 37 L. Ed. 2d 314, 93 S. Ct. 2332 (1973). In turn, a minority group's "voting strength" is measured in terms of its ability to elect candidates to public office. *Gingles,* 478

[10] We decline to address the arguments concerning whether the district court erred in dismissing seven of the nine plaintiffs for lack of standing. The question of standing in this appeal is purely academic. Two of the named plaintiffs are both current and former residents of the Fourth District and, therefore, unquestionably have standing to claim that the Fourth District dilutes minority voting strength in violation of Section 2.

U.S. at 88 (O'Connor, J., concurring) (observing that "minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers") (emphasis omitted)). In choosing the ability "to elect" its preferred candidates as the measure of a minority group's voting strength, the Court declined to address whether Section 2 permits claims, brought by a minority group too small to form a majority in a single-member district, that a practice "impairs its ability *to influence* [rather than to win] elections."[11] *Id.* at 46 n. 12. Thus, under existing Supreme Court authority, a vote dilution claim under Section 2 must be cast solely in terms of an allegation that a particular practice "impede[s] the ability of minority voters to elect representatives of their choice." *Id.* at 48.

Any claim that the voting strength of a minority group has been "diluted" must be measured against some reasonable benchmark of "undiluted" minority voting strength. As Justice Frankfurter once observed, "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until

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[11] The Supreme Court has repeatedly declined to rule on the viability of "influence" dilution claims. *See De Grandy*, 512 U.S. at 1008-09; *Voinovich*, 507 U.S. at 154 (1993); *Growe*, 507 U.S. at 41 n. 5. An "influence" claim alleges that minorities "ha[ve] enough political heft to exert significant influence on the choice of a candidate though not enough to determine that choice." *Barnett v. Chicago*, 141 F.3d 699, 703 (7th Cir. 1998). On the other hand, the plaintiffs' "coalition" claim alleges that minorities can, in fact, elect a candidate of their choice with the support of crossover voters from other racial or ethnic groups. *See Georgia v. Ashcroft*, 539 U.S. 461, 481-82, 156 L. Ed. 2d 428, 123 S. Ct. 2498 (distinguishing "influence" and "coalition" districts). Because the complaint does not raise an influence dilution claim, we do not consider the question here.

there is first defined a standard of reference as to what a vote should be worth." *Baker v. Carr,* 369 U.S. 186, 300, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) (Frankfurter, J., dissenting); *see also Gingles,* 478 U.S. at 88 (O'Connor, J., concurring) (noting that to evaluate a vote dilution claim, "it is . . . necessary to construct a measure of 'undiluted' minority voting strength.").

The size, compactness, and cohesiveness requirements of the *Gingles* preconditions are at the heart of the measure of undiluted voting strength that the Supreme Court has adopted for vote dilution claims. In *Gingles,* Justice O'Connor observed that the first and second preconditions establish a standard of undiluted minority voting strength in terms of the voting power a minority group could wield if its members were all concentrated within one, hypothetical single-member district.

> The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. *Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a majority will serve as the measure of its undiluted voting strength.* Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength.

Gingles, 478 U.S. at 90-91 (O'Connor, J., concurring) (emphasis added). The electoral ability of a group concentrated within a hypothetical single-member district makes sense as the measure of *undiluted* minority voting strength, because: (1) voting strength is measured in terms of a group's "ability to elect" candidates; and (2) "a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives *without white support*," while "a minority that could not constitute such a majority does not." *Id.* at 89 n. 1 (emphasis added).

Stated differently, minority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district. When the voting potential of a minority group that is large enough to form a majority in a district has been thwarted by the manipulation of district lines,[12] minorities may justly claim that their "ability to

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[12] The Supreme Court has observed that an impermissible dilution of minority voting strength can result from practices that spread a cohesive minority group across several legislative districts "so that it is a majority in none. . . ." *Voinovich*, 507 U.S. at 153. This practice is referred to as "cracking" a potential voting majority of racial minorities. *Vieth v. Jubelirer*, 158 L. Ed. 2d 546, 124 S. Ct. 1769, 1781 n. 7 (2004) (" 'Cracking' involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts."). On the other hand, vote dilution can also occur through "packing," a term that describes the "concentration of blacks into districts where they constitute an excessive majority." *Voinovich*, 507 U.S. at 154 (internal quotations omitted). The plaintiffs' vote dilution claim alleges both dilution-by-cracking and dilution-by-packing. Specifically, the plaintiffs allege that the 2001 Redistricting Plan reduces minority voting strength in the Fourth District by fragmenting a cohesive population of black voters in the Fourth District across several legislative districts. In addition, the plaintiffs allege that the new plan dilutes minority voting strength in the Fourth District by

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elect" candidates has been diluted in violation of Section 2. On the other hand, when minority voters, as a group, are too small or loosely distributed to form a majority in a single-member district, they have no ability to elect candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates. Under these circumstances, minorities cannot claim that their voting strength – that is, the potential to independently decide the outcome of an election – has been diluted in violation of Section 2. As the Supreme Court observed in *Growe,* a minority group claiming vote dilution must establish that it "has the potential to elect a representative *of its own choice* in some single-member district." *Growe,* 507 U.S. at 40 (emphasis added). And "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles,* 478 U.S. at 50 n. 17.

Ultimately, the right to "undiluted" voting strength in Section 2 is a guarantee of equal opportunity in voting, ensuring that a minority group is not denied, on account of race, color, or language minority status, the opportunity to exercise an electoral power that is commensurate with its population in the relevant jurisdiction. *See Smith v. Brunswick County,* 984 F.2d 1393, 1400 (4th Cir. 1993) (explaining that "the analysis [of a vote dilution claim] must consider whether the protected voting group has a voting opportunity that relates favorably to the group's population in the jurisdiction for which the election is being held."). This guarantee of equal opportunity in

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removing black voters from that district and packing them into what was already a majority-minority Third District.

voting is evident in the plain language of Section 2, which is violated whenever an election law or practice leaves minorities with "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also Voinovich,* 507 U.S. at 155 ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter."). As a result, to establish a vote dilution claim under Section 2, minorities must prove that they have been unlawfully denied the political opportunity they would have enjoyed as a voting-age majority in a single-member district: namely, the opportunity to "dictate electoral outcomes independently" of other voters in the jurisdiction. *Voinovich,* 507 U.S. at 154.

B.

In light of these principles informing a vote dilution claim under Section 2, we must conclude that the complaint in this case fails to state a claim upon which relief can be granted. The plaintiffs cannot establish that black voters have been denied an equal opportunity to elect candidates of their choice. The 2001 Redistricting Plan reduces the voting-age population of blacks in the Fourth District from 37.8 to 32.3 percent. It does not follow, however, that the new plan dilutes minority voting strength under Section 2. Section 2 and *Gingles* instruct that a plan may not create a barrier to the ability of minorities to elect their preferred candidates. As a group that could only form a minority of the voters in the Fourth District even before the Plan's enactment, the ability to elect candidates of their own choice was never within the

plaintiffs' grasp. *See Cano v. Davis,* 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (observing that "unless the minority group can establish that an effective majority-minority district can be created, a vote dilution claim is not cognizable because there is no minority voting power to dilute."), *aff'd,* 537 U.S. 1100, 154 L. Ed. 2d 768, 123 S. Ct. 851 (2003). The plaintiffs concede that black voters cannot form a majority in the Fourth District, and thereby elect a candidate, without the support of voters from other racial or ethnic groups.

The argument that a coalition of black and white voters may claim that a redistricting plan dilutes their *combined* ability to elect candidates confuses the purpose of Section 2. The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich,* 507 U.S. at 153. Section 2 is not violated unless minorities "have less opportunity *than other members of the electorate* to . . . elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis supplied). As a result, the question facing the plaintiffs is not whether a black-preferred candidate can be elected in the Fourth District after the 2001 Redistricting Plan. The question is whether black voters have less opportunity, in comparison to other voters of similar strength in the jurisdiction, to form a majority in the Fourth District, and thereby elect a candidate of their choice. *See Gingles,* 478 U.S. at 44 ("The right question [in the Section 2 analysis] is whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to

elect candidates of their choice.") (internal quotations omitted)). As the Sixth Circuit observed in *Nixon v. Kent County,* 76 F.3d 1381, 1392 (6th Cir. 1996), "the Voting Rights Act [is] aimed only at ensuring equal political opportunity: that every person's chance to form a majority is the same, regardless of race or ethnic origin."

At roughly 38 percent of the voting-age population in the Fourth District before the 2001 Redistricting Plan, blacks possessed the same opportunity to elect a candidate as any group that cannot form a majority of the voters in a district. A minority group that is too small to form a majority may be able to join with other voters to elect a candidate it supports. However, such groups will be obliged "to pull, haul, and trade to find common political ground" with other voters in the district. *De Grandy,* 512 U.S. at 1020. The 2001 Redistricting Plan does not change this fact for black voters in the Fourth District; their political fortunes remain tied to the interests of other voters in the district. Because the same is true for all other groups in the Fourth District that are too small to dominate an election with their own votes, the plaintiffs cannot establish that black voters in the Fourth District have less opportunity "than other members of the electorate" to elect candidates of their choice. 42 U.S.C. § 1973(b); *see also Session v. Perry,* 298 F. Supp. 2d 451, 483 (E.D. Tex. 2004) ("A minority group lacking a majority cannot elect its candidate of choice, and denying the group a separate district cannot be a denial of any opportunity protected by the Act.").

Furthermore, any construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that

creates advantages for political coalitions that are not so defined. "Congress enacted § 2 of the Voting Rights Act . . . to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude.'" *Voinovich,* 507 U.S. at 152 (quoting U.S. Const. amend. XV, § 1).

> The purpose of the [Voting Rights] Act is to redress racial or ethnic discrimination which manifests itself in voting patterns or electoral structures. . . . If a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities.

Campos v. City of Baytown, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of reh'g en banc).

The essence of the plaintiffs' claim in this action is the assertion of a right to preserve their strength for the purposes of forging an advantageous political alliance. This is understandable, to be sure. However, we cannot find a basis for the protection of such a right in Section 2. The Voting Rights Act "is a balm for racial minorities, not political ones – even though the two often coincide." *Baird v. Consol. City of Indianapolis,* 976 F.2d 357, 361 (1992). A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition

with other racial or ethnic groups, does not result in vote dilution "on account of race" in violation of Section 2.[13]

IV.

Because the plaintiffs cannot establish that black voters in the Fourth District can form a majority in a single-member district as required by *Gingles,* the complaint fails to state a vote dilution claim under Section 2. Accordingly, the district court's order dismissing the complaint with prejudice is

AFFIRMED.

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[13] The plaintiffs' reliance on *Georgia v. Ashcroft* fails for the same reason. The plaintiffs claim that the Supreme Court in *Georgia* retreated from the *Gingles* rule that a minority group can claim no right under Section 2 unless it can form a majority of the voters in a single-member district. In *Georgia,* the Supreme Court noted that "[t]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." 539 U.S. at 481 (internal quotations omitted). We do not believe that this observation alters the *Gingles* numerical majority requirement in any way. A coalition of black and white voters can certainly join forces to elect a candidate, but Section 2 does not create an *entitlement* for minorities to form an alliance with other voters in a district who do not share the same statutory disability as the protected class.

APPENDIX B

JUDGMENT

FILED: September 22, 2004

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 03-2113
CA-03-151

JOAN HALL; RICHARD PRUITT;
THOMASINA PRUITT; VIVIAN CURRY;
EUNICE MCMILLAN; JAMES SPELLER;
ROBBIE GARNES, LESLIE SPEIGHT

Plaintiffs-Appellants,

and

ELIJAH SHARPE

Plaintiff

v.

COMMONWEALTH OF VIRGINIA;
JEAN JENSEN, Secretary, State Board
of Elections in her official capacity;
JERRY W. KILGORE, in his official capacity
as Attorney General of the Commonwealth
of Virginia; GARY THOMPSON,
CHARLES BROWN; JAMES BROWN;
JAMES ALFRED CAREY; EVELYN CHANDLER;
CLIFTON E. HAYES, JR.; QUENTIN E. HICKS;
IRENE HURST; WAYNE OSMORE

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

(Filed Oct. 15, 2004)

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

A True Copy, Teste:
Patricia S. Connor, Clerk
BY /s/ Barbara Rowe
Deputy Clerk

APPENDIX C

JOAN HALL, ET AL., Plaintiffs, v. COMMONWEALTH OF VIRGINIA, ET AL., Defendants.

Civil Action No: 2:03cv151

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

276 F. Supp. 2d 528; 2003 U.S. Dist. LEXIS 19187

August 7, 2003, Decided

COUNSEL: For Joan Hall, Richard Pruitt, Thomasina Pruitt, Vivian Curry, Eunice McMillan, James Speller, Robbie Garnes, Leslie Speight, PLAINTIFFS: J Gerald Hebert, J Gerald Hebert, PC, Alexandria, VA USA. Donald Lee Morgan, Cleary Gottlieb Steen & Hamilton, Washington, DC USA. Melissa Marie Johns, Cleary Gottlieb Steen & Hamilton, Washington, DC USA. Chandra Walker Holloway, Cleary Gottlieb Steen & Hamilton, Washington, DC USA. Tamara Schmidt, Cleary Gottlieb Steen & Hamilton, Washington, DC USA. Anita Sue Hodgkiss, Unc School of Law Van Hecke-Wettach Hall, Chapel Hill, NC USA.

For Elijah Sharpe, PLAINTIFF: Melissa Marie Johns, Cleary Gottlieb Steen & Hamilton, Washington, DC USA. Chandra Walker Holloway, Cleary Gottlieb Steen & Hamilton, Washington, DC USA. Tamara Schmidt, Cleary Gottlieb Steen & Hamilton, Washington, DC USA.

For Commonwealth of Virginia, Jean Jensen, DEFENDANTS: Edward Meade Macon, Assistant Attorney General, Richmond, VA USA.

For Gary Thompson, Charles Brown, James Brown, James Alfred Carey, Evelyn Chandler, Clifton E Hayes, Jr, Quentin E Hicks, Irene Hurst, Wayne Osmore, INTERVENOR-DEFENDANTS: Michael A Carvin, Cooper Carvin & Rosenthal, Washington, DC USA. Louis Karl Fisher, Jones Day, Washington, DC USA. Cody Ryan Smith, Jones Day, Washington, DC USA.

For Jerry W Kilgore, INTERVENOR-DEFENDANT: James Christian Stuchell, Office of the Attorney General, Richmond, VA USA. Francis Snead Ferguson, Office of Attorney General of Va, Richmond, VA USA. Edward Meade Macon, Assistant Attorney General, Richmond, VA USA. Judith W Jagdmann, Office of the Attorney General, Richmond, VA USA.

JUDGES: HENRY COKE MORGAN, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: HENRY COKE MORGAN, JR.

OPINION:

ORDER

This matter comes before the Court on three different motions to dismiss, filed by the Commonwealth of Virginia, et al. (document no. 11), by Virginia Attorney General Jerry W. Kilgore (document no. 29), and by Gary Thompson, et al. (document no. 32). The Plaintiffs bring a vote dilution claim under § 2 of the Voting Rights Act of 1965, as amended, *see* 42 U.S.C. § 1973, challenging the recently redrawn boundaries of the Virginia Fourth Congressional District. The motions require the Court to decide whether § 2 of the Act obliges the Commonwealth to adjust the boundaries for the Virginia Fourth Congressional District even though the protected group represented by

the Plaintiffs would not constitute a majority in the reconfigured district. The motions are fully briefed.[1] At a hearing conducted on July 22, 2003, the Court took the motions under advisement. Having concluded that § 2 of the Voting Rights Act affords no vote dilution claim in these circumstances, the Court hereby GRANTS each of the three Defendants' motions to dismiss.

PROCEDURAL AND FACTUAL HISTORY[2]

The Plaintiffs filed this action on February 21, 2003. The action arises out of a redrawing of the boundaries for the Fourth Congressional District that was put in effect in July 2001, when the then Governor, a Republican, signed a new Congressional district plan into law. *See* Complaint ¶ 1. The plan is codified at Va. Code § 24.2-302.1 and will

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[1] The briefs on the Commonwealth's motion are document no. 12 (opening brief), document no. 22 (opposition brief), and document no. 24 (rebuttal brief). The briefs on Kilgore's motion are document nos. 12 & 33 (Kilgore adopts the opening briefs filed by the other two Defendants) and document no. 24 (Kilgore and the Commonwealth filed a joint rebuttal brief). The opening brief filed by the other two Defendants were adopted by Kilgore, and the Plaintiffs filed an opposition to both of those briefs. This eliminated the need for the Plaintiffs to file a brief opposing the Kilgore motion (and no such brief was filed). The briefs on Thompson's motion are document no. 33 (opening brief), document no. 37 (opposition brief), and document no. 40 (rebuttal brief). The Court gave no consideration to the additional rebuttal brief, document no. 35, filed by the Thompson Defendants as it was submitted to the Court in a manner outside of the briefing schedule announced at the hearing conducted on June 23, 2003. *See* Order entered on July 9, 2003 at page 3 (document no. 38).

[2] The facts recited herein are facts assumed for the purpose of deciding the instant motions to dismiss, and are not factual findings for any other purpose.

be referred to in this Order as the "2001 Redistricting Plan".

The Plaintiffs are nine black citizens who either reside in the newly drawn Fourth District or who formerly resided in the District but now find themselves outside the District as a result of the boundary change that went into effect in 2001. *See* Complaint ¶¶ 7-14. Defendant Commonwealth of Virginia is headed by the present Governor, a Democrat. Another Defendant, the Secretary of the State Board of Elections, was appointed to her post by the present Governor. *See* Complaint ¶¶ 15-16. Defendant Kilgore and the Thompson, et al., Defendants, entered the case via intervention. *See* Order entered on June 17, 2003 (document no. 28) (Kilgore) & Order entered on July 9, 2003 (document no. 38) (Thompson, et al.).

Because the Commonwealth is subject to § 5 of the Voting Rights Act of 1965, the newly enacted law was submitted to the United States Department of Justice for "preclearance." *See* Complaint ¶ 36. To obtain preclearance under § 5, a covered jurisdiction must establish that its proposed redistricting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c). On October 16, 2001, finding that the Commonwealth had established that the 2001 Redistricting Plan had neither the purpose nor the effect of denying or abridging the right to vote because of race, the Department of Justice precleared the redistricting plan. *See* Complaint ¶ 37.

Blacks currently comprise 33.6% of the Fourth District's total population, whereas, in the District as previously

drawn, blacks comprised 39.4% of the total population.[3] *See* Complaint ¶ 17. When the District lines were redrawn pursuant to the 2001 Redistricting Plan a number of black residents were shifted out of the Fourth District and into the Third and the Fifth Districts. *See* Complaint ¶ 20. The Third District is a black majority District, where blacks comprise 54% of the total population. *See* Complaint ¶ 26. The Plaintiffs' chief concern is the displacement of blacks out of the Fourth District and into the Third District and Fifth Districts. Because the Third District is a black majority district the Plaintiffs allege that the 2001 Redistricting Plan unnecessarily "packs" blacks into the Third District, *see* Complaint ¶ 39, and dilutes the voting strength of blacks in the Fourth District, *see id.; see also* Complaint ¶ 20. Both in the Complaint and at the hearing, Plaintiffs confirmed that their goal is to restore the black total population in the Fourth District to approximately 40%. *See* Complaint ¶ 25; Transcript at page 21, lines 12-14 (document no. 43). The Plaintiffs do not seek to establish a black majority in District Four.[4]

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[3] The Complaint relies on the "black total population" metric instead of "black voting age population". The black voting age population metric is far more useful because it better relates to voting strength. *See Barnett v. Chicago,* 141 F.3d 699, 704 (7th Cir.), *cert. denied,* 524 U.S. 954, 141 L. Ed.2d 740, 118 S. Ct. 2372 (1998); *see also Burton v. Sheheen,* 793 F. Supp. 1329, 1354 (D. S.C. 1992) ("political opportunity is best measured in terms of minority voting age population").

[4] The Plaintiffs, in ¶ 33 of the Complaint, outline the features of three alternative plans that were considered by the Commonwealth. One of those plans, the Maxwell-Crittenden plan, would, if adopted, have created a black majority in the Fourth District. The Plaintiffs however do not seek implementation of the Maxwell-Crittenden plan. (The Thompson Defendants proffer undisputed public records and, from those records, argue persuasively that it would be impossible to create a

(Continued on following page)

Plaintiffs' Counsel at the hearing suggested that the black total population in the Fourth District can be built up to approximately 40% by redrawing the boundary line that separates the Third and the Fifth Districts from the Fourth District. This would shift blacks out of the Third and Fifth Districts, and into the Fourth District. Under this approach, the increase in black representation in the Fourth District comes at the expense of the Third and Fifth Districts. *See* Transcript at page 22, lines 13-17 (document no. 43). The Plaintiffs do not allege that the Third District would remain a black majority district should their plan be adopted. Given the mathematics involved, it appears that adoption of the Plaintiffs' plan would eliminate the black majority that presently exists in the Third District. However, the Court need not make a finding on this issue given the relief sought by the Plaintiffs. Even so, the Plaintiffs argue that elimination of their majority in the Third District is of no concern because a non-majority black population in the Third District would retain the ability to elect the candidate of their choice. *See* Complaint ¶ 26.

STANDARD OF REVIEW

The function of a motion to dismiss is to test the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. *Republican Party of North*

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black majority in the Fourth District without destroying the black majority in the Third District.) As Plaintiffs' Counsel stated in open court during the hearing, the Plaintiffs' goal is to increase the black population in the Fourth District to approximately 40% and not to create a black majority in that District.

Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (internal citation and quotation marks omitted). In ruling on a Rule 12(b)(6) motion, a Court should keep in mind that as a matter of general course it is a "disfavored motion." *Fayetteville Investors v. Commercial Builders, Inc.,* 936 F.2d 1462 (4th Cir. 1991). A motion to dismiss under Rule 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Martin Marietta Corp. v. International Telecommunications Satellite Org.,* 991 F.2d 94, 97 (4th Cir. 1993). During the process of considering a motion to dismiss for failure to state a claim, a court must construe the complaint in the light most favorable to the non-moving party and take that party's allegations as true. *Jenkins v. McKeithen,* 395 U.S. 411, 421-22, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). The Court primarily relies on the allegations in the complaint during a 12(b)(6) ruling, but may also consider documents attached to the complaint and incorporated by reference. *Simons v. Montgomery County Police Officers,* 762 F.2d 30, 31-32 (4th Cir. 1985). *Simons* documents may be copies of case law, undisputed contracts or public documents, such as those used to establish ownership or proper zoning. *See id.; see also Norfolk Federation of Business Districts v. Department of Housing and Urban Development,* 932 F.Supp. 730, 736-37 (E.D. Va. 1996).

ANALYSIS

The Plaintiffs' contention is that, even though blacks did not constitute a majority in the Fourth District prior to

the time when the 2001 Redistricting Plan was implemented, the 5.8% reduction in the total black population in that district brought about by the 2001 Redistricting Plan violates § 2 because it impermissibly dilutes the black vote. The Commonwealth argues that seven of the nine Plaintiffs lack standing. All three Defendants argue that the Plaintiffs fail to state a claim.

A. Standing

The Commonwealth argues that only those Plaintiffs who reside within the Fourth District (as redrawn by the 2001 Redistricting Plan) have standing. *U.S. v. Hays,* 515 U.S. 737, 744-45, 132 L. Ed. 2d 635, 115 S. Ct. 2431 (1995) (a racial gerrymander case). The Commonwealth concedes standing as to the two Plaintiffs who reside within the Fourth District. *See* Transcript at page 4, lines 3-4 & page 41, line 25 to page 42, line 1 (document no. 43).

Though not precisely on point, the Court is persuaded by the principle established in *Hays.* The Plaintiffs who reside outside of the Fourth District do not suffer the same type of harm as those who reside within, and such non-resident Plaintiffs therefore assert "only a generalized grievance against governmental conduct of which he or she does not approve." *Hays,* 515 U.S. at 745. Additionally, the harm asserted by the non-resident Plaintiffs is not necessarily redressed by the relief sought from the Court as those Plaintiffs have no guarantee that they will find themselves back inside the Fourth District should the Plaintiffs prevail on the merits. The Supreme Court has repeatedly found that plaintiffs who reside outside a district lack standing to challenge that district on voting rights grounds. *See Sinkfield v. Kelley,* 531 U.S. 28, 30, 148

L. Ed. 2d 329, 121 S. Ct. 446 (2000); *Bush v. Vera,* 517 U.S. 952, 957, 135 L. Ed. 2d 248, 116 S. Ct. 1941 (1996); *Hays,* 515 U.S. at 744-745. Accordingly, the Court finds that Plaintiffs Joan Hall and Leslie Speight have standing by virtue of their residency within the Fourth District. All other Plaintiffs are **DISMISSED FOR LACK OF STANDING.**

B. The Vote Dilution Claim

Section 2 of the Voting Rights Act prohibits any "qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973(a). A denial or abridgement of the right to vote in violation of § 2 is established when:

> Based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

As a threshold matter, in order to proceed with a vote dilution claim under § 2 of the Voting Rights Act, members of a protected minority group must establish three "necessary preconditions." *Thornburg v. Gingles,* 478 U.S. 30, 50-51, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986).[5] "First, the minority group must be . . . sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. "Second, the minority group must be . . . politically cohesive." *Id.* at 51. And third, the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* If the Plaintiffs can prove each of these three preconditions, they may then present evidence that, under the "totality of the circumstances" test identified in 42 U.S.C. § 1973(b), there has been impermissible vote dilution. However, "unless these points are established, there neither has been a wrong nor can be a remedy." *Growe v. Emison,* 507 U.S. 25, 40-41, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993). The *Gingles* preconditions thus establish a bright line test that the Plaintiffs must satisfy before the Court may reach the merits of their vote dilution claim. *See, e.g., Valdespino v. Alamo Heights Indep. School Dist.,* 168 F.3d 848, 852 (5th Cir. 1999), *cert. denied,* 528 U.S. 1114, 145 L. Ed. 2d 811, 120 S. Ct. 931 (2000). The three *Gingles* factors do not alone necessarily establish a § 2 violation, but if Plaintiffs cannot establish the preconditions, they cannot establish a § 2 claim. *Uno v. City of Holyoke,* 72 F.3d 973, 988 (1st Cir.

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[5] While the *Gingles* Court construed § 2 in the context of a challenge to a multi-member district, 478 U.S. at 50, it is nevertheless clear that the preconditions apply with equal force to challenges to single-member districts, such as the Fourth Congressional District. *Growe v. Emison,* 507 U.S. 25, 40, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993).

1995) ("In any claim brought under . . . § 2, the *Gingles* preconditions are central to the plaintiffs' success.").

Of particular importance in the instant case is the first *Gingles* precondition; that is, the requirement that the minority group demonstrate that its population is sufficiently large and geographically compact to constitute a majority in a single-member district. The reason for this requirement is clear: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles,* 478 U.S. at 50 n.17 (emphasis in original); *see also Growe,* 507 U.S. at 40 (The first precondition is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.").

The Supreme Court has explained this first precondition as follows: "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating *more than the existing number* of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy,* 512 U.S. 997, 1008, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994) (emphasis added). Thus, a § 2 plaintiff must demonstrate that it is possible to create additional geographically compact majority-minority districts.

The instant Plaintiffs cannot satisfy the first *Gingles* precondition because the relief they seek will fail to create an additional geographically compact majority black district in the Fourth Congressional District. Instead, the Plaintiffs' plan restores the black population in the Fourth District to its pre-2001 Redistricting Plan level without

creating a majority therein. This falls short of what is required by the *Gingles* first precondition.

Plaintiffs rely on footnote 12 in the *Gingles* opinion (pertaining to so-called "influence districts"), several out-of-circuit district court opinions, and various law review articles to argue that they can proceed with their vote dilution claim even though their remedy sought for the Fourth District would not create a majority black population. They contend that an increase in black representation in the Fourth District to approximately the 40% level will enable blacks to combine with white crossover voters[6] to elect the minority's candidate of choice. The Plaintiffs argue that the first *Gingles* precondition requires nothing more. Plaintiffs' Counsel at oral argument referred to a non-majority district where blacks with help of white crossover votes can elect the black candidate of choice as a "coalition district,"[7] a "performance district,"[8] or an "ability

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[6] The term "crossover voters" has been defined as voters from outside the protected group who cast their votes for the protected group's candidate of choice. *See, e.g., Johnson v. De Grandy,* 512 U.S. 997, 1008, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994). The term would presumably apply also to voters from inside the protected group who cast their votes for another group's candidate of choice.

[7] The U.S. Supreme Court has described a coalition district as one where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Georgia v. Ashcroft,* 539 U.S. 461, 156 L. Ed. 2d 428, 2003 U.S. LEXIS 5012, *39, 123 S. Ct. 2498 (2003).

[8] This term is apparently borrowed from *Martinez v. Bush,* 234 F. Supp. 2d 1275 (S.D. Fla. 2002). The Court there held that the first *Gingles* precondition, which requires that the protected group "constitute a majority", should not be construed as a literal, mathematical requirement. Instead, the Court in *Martinez* held that the first *Gingles* precondition is satisfied so long as the district will "perform" for the protected group. *Id.* at 1321 n.56.

to elect district."[9] The Plaintiffs attempt to distinguish the foregoing three forms of districts from an "influence district,"[10] which they suggest is one where the non-majority black vote is large enough to influence the selection of candidates but too small to elect the black candidate of choice. *See* Plaintiffs' brief opposing the Commonwealth's motion to dismiss at 11 (document no. 22).

The Defendants acknowledge that the Supreme Court in *Gingles* left open the question of whether a vote dilution could be brought in an "influence district." They argue that no such cause of action should exist in an "influence district" because every Federal Circuit Court that has considered the question has refused to recognize such claims and because policy concerns militate against the recognition of such claims. However, the Plaintiffs argue their vote dilution claim is based upon something other than an "influence district," and argue that different

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[9] Plaintiffs cite *Armour v. Ohio,* 775 F. Supp. 1044, 1059 n.19 (N.D. Ohio 1991) for the "ability to elect" nomenclature and for the distinction between an "ability to elect" district and an "influence" district. *See* Plaintiffs' brief opposing the Commonwealth's motion to dismiss at 11 (document no. 22). In an "ability to elect" district, according to *Armour,* the minority group has the ability to elect a candidate of its choice irrespective of whether the minority group constitutes a majority of the voting population in the district.

[10] The U.S. Supreme Court has described an influence district as one "where black voters would be able to exert a significant – if not decisive – force in the election process." *Georgia v. Ashcroft,* 539 U.S. at 461, 156 L. Ed. 2d 428, 2003 U.S. LEXIS 5012, *19, 123 S. Ct. 2498 (2003). Stated another way, an influence district is one "in which a minority group has enough political heft to exert significant influence on the choice of candidate though not enough to determine that choice." *Barnett v. Chicago,* 141 F.3d 699, 703 (7th Cir.), *cert. denied,* 524 U.S. 954, 141 L. Ed. 2d 740, 118 S. Ct. 2372 (1998).

standards should be applied to a "coalition district," a "performance district," or an "ability to elect district."

Plaintiffs argue a "coalition district," "performance district" and an "ability to elect district" are districts where the protected group is able to elect its candidate of choice provided that the protected group supplements its own vote with crossover votes from another group or groups. The Plaintiffs allege that the Fourth District is such a district. The Court, therefore, must decide whether § 2 of the Voting Rights Act creates a vote dilution claim for districts of this type. Neither the U.S. Supreme Court, the Fourth Circuit,[11] nor any District Court within the Fourth Circuit[12] has passed on the viability of vote dilution

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[11] In the vote dilution case of *Collins v. Norfolk,* 883 F.2d 1232 (4th Cir. 1989), *cert. denied,* 498 U.S. 938, 112 L. Ed. 2d 305, 111 S. Ct. 340 (1990), the Fourth Circuit recognized the necessity for the protected group to prove it constituted a majority. The issue of "influence" or "coalition" districts was not addressed. *See also Cane v. Worcester County,* 35 F.3d 921, 925-26 (4th Cir. 1994) (same), *cert. denied,* 513 U.S. 1148, 130 L. Ed. 2d 1065, 115 S. Ct. 1097 (1995); *Smith v. Brunswick County,* 984 F.2d 1393, 1400-02 (4th Cir. 1993) (same); *McGhee v. Granville County,* 860 F.2d 110, 119 (4th Cir. 1988) (noting that the *Gingles* preconditions preclude "some small and unconcentrated minority groups" from bringing a vote dilution claim – the issue of "influence" or "coalition" districts was not addressed).

[12] Neither the briefs submitted by the parties nor the Court's own research disclose any District Court opinions within the Fourth Circuit that address the issue of "influence" or "coalition" districts. *See Colleton County Council v. McConnell,* 201 F. Supp. 2d 618, 642 (D. S.C. 2002) (Court recognizes the necessity for the protected group to prove it constituted a majority; the issue of "influence" or "coalition" districts was not addressed); *Marylanders for Fair Representation v. Schaefer,* 849 F. Supp. 1022, 1051-52 (D. Md. 1994) (Court rejects argument that the *Gingles* first precondition requires the protected group to show that it constitutes *more* than a majority); *NAACP v. City of Columbia,* 850 F. Supp. 404, 413 (D. S.C. 1993) (Court recognizes the necessity for the protected group to prove it constituted a majority; the issue of "influence"

(Continued on following page)

claims in a "coalition district," "performance district" or an "ability to elect district." It thus appears to be an issue of first impression within this Circuit.

The starting point in the analysis is to recognize that the Supreme Court confirmed that a vote dilution claim will survive the first *Gingles* precondition when the protected group postulates majority status for itself in a geographically compact redrawn district. The *Gingles* Court, however, did not rule on whether the converse is true. That is, the Supreme Court did not hold that vote a dilution claim could never be brought unless the protected group could constitute a majority. By inserting footnote 12 into the opinion the Supreme Court left open the question of whether a vote dilution claim could be brought with respect to an "influence district":

> We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

Gingles, 478 U.S. at 46 n.12; *see also Growe v. Emison,* 507 U.S. 25, 41 n.5, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993) (same); *Voinovich v. Quilter,* 507 U.S. 146, 155, 122 L. Ed. 2d 500, 113 S. Ct. 1149 (1993) (same); *Johnson v. De*

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or "coalition" districts was not addressed); *Burton v. Sheheen,* 793 F. Supp. 1329, 1354 (D. S.C. 1992) (Court holds that the *Gingles* first precondition is satisfied "if the percentage of the black voting age population is greater than 50 percent"; the issue of "influence" or "coalition" districts was not addressed).

Grandy, 512 U.S. 997, 1008-09, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994) (same).

Although the U.S. Supreme Court has left the door open to vote dilution claims in an "influence" district, the five Circuit Courts of Appeal which have considered the issue have uniformly rejected all such claims.[13] For instance, the Sixth Circuit in *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir. 1998), *cert. denied,* 525 U.S. 1138, 143 L. Ed. 2d 37, 119 S. Ct. 1026 (1999), rejected the claim that the Voting Rights Act compelled the creation of a single-member district with a thirty-four percent black voting-age population. 145 F.3d at 827. The Sixth Circuit held:

> We find the plaintiffs' [claim] . . . particularly lacking because it is based on the premise that the Section 2 violation in this case consists of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it. . . . We would reverse any decision to allow such a claim to proceed since we do not feel that an "influence" claim is permitted under the Voting Rights Act.

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[13] Though five Circuit Courts of Appeal have rejected vote dilution claims in "influence" districts, the First Circuit has suggested that such claims may eventually be recognized. *See Uno v. City of Holyoke,* 72 F.3d 973, 979 n.2 (1st Cir. 1995) (the first *Gingles* "precondition will have to be reconfigured to the extent that the courts eventually validate so-called influence dilution claims").

Id. at 828-29 (emphasis in original).[14] In another case, the Sixth Circuit, sitting *en banc,* confirmed that where a single minority group cannot comprise the majority of a proposed district's voting-age population, minorities have no valid Section 2 objection to a redistricting plan. *Nixon v. Kent County,* 76 F.3d 1381, 1394 (6th Cir. 1996); *contra, Campos v. Baytown,* 840 F.2d 1240, 1244 (5th Cir. 1988) (aggregating blacks and Hispanics into a majority satisfies the first *Gingles* precondition, even though neither group by itself can rightly claim majority status), *cert. denied,* 492 U.S. 905, 106 L. Ed. 2d 564, 109 S. Ct. 3213 (1989). The Sixth Circuit explained that, to elect representatives of their choice, members of such a group would, by definition, be required to form political coalitions with members of one or more other groups. *Nixon,* 76 F.3d at 1392. Requiring districts amenable to such bi-racial coalitions would transform "the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *Id.* (quoting *League of United Latin Am. Citizens v. Clements,* 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring)).

Similarly, the Seventh Circuit rejected a § 2 claim that a district must be created with black voting-age populations between forty-three and forty-four percent: "We cannot consider claims that . . . districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to

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[14] Plaintiffs' Counsel, in scholarly writings he authored, candidly acknowledges that "most courts . . . reject[] the contention that minority groups can demand districts in which they do not constitute some kind of majority." Hebert, *Redistricting in the Post-2000 Era,* 8 GEO. MASON L. REV. 431, 440 (2000).

win elections must also be impaired." *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988), *cert. denied,* 490 U.S. 1031, 104 L. Ed. 2d 204, 109 S. Ct. 1769 (1989). And the Fifth Circuit, holding that vote dilution claimants are "required . . . to prove that their minority group exceeds 50% of the relevant population in [a potential] district," affirmed a judgment against plaintiffs after finding that Hispanics could at most make up only 48.3 percent of a district's voting-age citizen population. *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied,* 528 U.S. 1114, 145 L. Ed. 2d 811, 120 S. Ct. 931 (2000); *accord, Negron v. City of Miami Beach,* 113 F.3d 1563, 1569 (11th Cir. 1997) (holding that § 2 vote dilution claim cannot succeed when a protected group fails to comprise a majority of the citizen voting-age population); *Romero v. City of Pomona,* 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) ("We are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district."), *overruled on other grounds, Townsend v. Holman Consulting,* 914 F.2d 1136 (9th Cir. 1990).

The Plaintiffs argue that they do not seek the creation of an "influence district" in the Fourth Congressional District. The Plaintiffs instead argue for a "coalition district"[15] which, they contend, is analytically distinct. There is some support for their position in *Georgia v. Ashcroft,* 539 U.S. 461, 156 L. Ed. 2d 428, 123 S. Ct. 2498

[15] The Plaintiffs also denominate the Fourth District as a "performance district" or an "ability to elect district." The Court **FINDS** that these terms are interchangeable and have equivalent meaning as well as legal effect (*see* definitions of these terms *supra* in notes 7-9).

(2003), where the Supreme Court defined a "coalition district," albeit in dicta, as a district where the protected group wields more power than would be the case in an "influence district." The question, then, is whether the disfavor that has befallen vote dilution claims in "influence districts" likewise precludes such claims with respect to "coalition districts." The Court **FINDS** that it does.

Simply assessing whether a certain minority percentage will affect an electoral outcome would require courts to make, as then-Judge Stephen Breyer aptly noted in rejecting such a claim, "the very finest of political judgments about possibilities and effects – judgments well beyond their capacities." *Latino Political Action Comm. v. City of Boston,* 784 F.2d 409, 412 (1st Cir. 1986). Members of any protected minority group could always launch a lawsuit to increase their presence in a district from 15 percent to 20 percent, or from 20 percent to 25 percent, and argue that this increase will cause their candidate to prevail. As the Seventh Circuit put it, "courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil,* 851 F.2d at 947; *see also McGhee v. Granville County,* 860 F.2d 110, 116 (4th Cir. 1988) (citing *McNeil* for proposition that first *Gingles* precondition is necessary to prevent vote dilution concept from being "an open-ended one subject to no principled means of application"); *Burton v. Sheheen,* 793 F. Supp. 1329, 1350 (D. S.C. 1992) (the *Gingles* preconditions shield "the courts from meritless claims"). "Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense

and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations." *Gingles v. Edmisten,* 590 F.Supp. 345, 381 (E.D. N.C. 1984), *aff'd in part, rev'd in part, Thornburg v. Gingles,* 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986).[16]

This point is aptly illustrated here, where Plaintiffs allege that a 34 percent black population in the Fourth District denies black voters their basic voting rights but an "approximately 40%" black population would guarantee those rights. *See* Complaint ¶ 25. Thus, the Court will be required to find that this six percent differential is of critical significance, because white crossover voting is enough to elect a black-preferred candidate at 40 percent, but plainly insufficient at 34 percent.[17]

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[16] *See also Metts v. Almond,* 217 F. Supp. 2d 252, 258 (D. R.I. 2002) (observing that there would be no "ascertainable and objective standard for adjudicating [influence] claims" because it would be "virtually impossible to reliably calculate the number of minority voters that would be required in order to 'influence' election results"); *Illinois Legislative Redistricting Comm'n v. LaPaille,* 786 F. Supp. 704, 715 (N.D. Ill.) ("The requirement that a minority group be large enough to control a district, not just 'influence' it, enables the courts to adjudicate Voting Rights claims with a reasonable amount of efficiency and consistency."), *aff'd,* 506 U.S. 948, 121 L. Ed. 2d 325, 113 S. Ct. 399 (1992); *Hastert v. State Bd. of Elections,* 777 F. Supp. 634, 654 (N.D. Ill. 1991) (three-judge court) (Once the *Gingles* majority "threshold is breached, there appears to be no logical or objective measure for establishing a threshold minority group size necessary for bringing an influence claim under § 2.").

[17] Arguably, the "enhanced" opportunity requested by Plaintiffs in the Fourth District could only be attained by shifting black voters out of the adjoining majority black Third Congressional District (if the Plaintiffs are to keep faith with the "compactness" requirement of the first *Gingles* precondition).

The Plaintiffs' proposal could jeopardize the ability of black voters to elect their candidate of choice in the Third District. Thus, under Plaintiffs' view, Section 2 should be interpreted to threaten Virginia's first majority black district in order to increase the Fourth District's black population to 40 percent. In other words, Plaintiffs argue § 2 mandates the creation of two minority black districts where black voters in each are dependent upon white crossover voting to elect their preferred candidates. In paragraph 26 of their Complaint Plaintiffs postulate that in the Third District, which is currently represented by a popular incumbent who was the black candidate of choice, the incumbent could win reelection even if the 54% black population in that district were significantly reduced. The uncertainty inherent in such forecasts illustrates the danger of courts speculating in "the very finest of political judgments." *Latino Political Action Comm., Inc. v. City of Boston,* 784 F.2d 409, 412 (1st Cir. 1986). Federal Circuit Courts of Appeal which have considered the issue have uniformly rejected such a speculative and intrusive judicial role in enforcing the Voting Rights Act.

The Court is also mindful "that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts." *Growe v. Emison,* 507 U.S. 25, 34, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993) (citing U.S. Const., Art. I, § 2). Though this Court should not shrink from its duty to act when a violation of federal law is afoot, it is reluctant to expand the interpretation of Voting Rights Act § 2 where, as here, the result "represents a significant intrusion into the rights of states and their subdivisions to manage local governance as they will." *Nixon v. Kent County,* 76 F.3d 1381, 1390 (6th Cir. 1996) ("Although the aims of the

Voting Rights Act are laudable, this delicate balance provides additional evidence that the words of the 1982 amendment were chosen with particular care and courts should be cautious in construing them.").

SUMMARY

The Plaintiffs correctly point out that the Supreme Court in *Gingles, Growe, Voinovich*, and *Johnson,* left open the issue of whether a vote dilution claim could be brought in an "influence district." It is reasonable to conclude that the issue remains similarly open on the question of whether a vote dilution claim may be brought in a "coalition district," since the Supreme Court has not addressed that particular question. All five Circuit Courts of Appeal that have considered the question of an "influence district" have held that the first precondition in *Gingles* establishes a bright line that precludes vote dilution claims in other than so called majority-minority districts. Two District Courts, however, have stepped across that bright line, and held that a vote dilution claim may be brought in a district where the protected group will not constitute a majority.[18] Neither the U.S. Court of Appeals for the Fourth Circuit nor any District Court in this Circuit have spoken to the issue of "coalition districts" or "influence districts," and the Plaintiffs have presented no argument which persuades this Court to deviate from what is clearly the majority

[18] *See Martinez v. Bush,* 234 F. Supp. 2d 1275, 1321 n.56 (S.D. Fla. 2002); *Armour v. Ohio,* 775 F. Supp. 1044, 1050-52 (N.D. Ohio 1991) (it should be noted that *Armour*'s interpretation of the first *Gingles* precondition pre-dated the Sixth Circuit's decision in *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir. 1998), *cert. denied,* 525 U.S. 1138, 143 L. Ed 2d 37, 119 S. Ct. 1026 (1999)).

rule. Further, as the Federal Circuit Courts have observed, Federal Courts ought to avoid intrusive speculation on political matters of the type presented here. The Plaintiffs ask this Court to create a rule that would substitute the Federal Courts' subjective estimate of minority voter influence in an "influence" or "coalition" district for the well established and objective rule requiring a majority-minority district. The Court will adhere to existing precedent set by the five Circuit Courts of Appeal and **GRANT** the Defendants' motions to dismiss.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED**.

HENRY COKE MORGAN, JR.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 7, 2003

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOAN HALL, RICHARD PRUITT, THOMASINA PRUITT, VIVIAN CURRY, ELIJAH SHARPE, EUNICE MCMILLAN, JAMES SPELLER, ROBBIE GARNES, and LESLIE SPEIGHT,	)
Plaintiffs,	) COMPLAINT
vs.	) Civil Action No. 2:03-CV-151
COMMONWEALTH OF VIRGINIA, and JEAN JENSEN, SECRETARY, STATE BOARD OF ELECTIONS in her official capacity.	) (Filed Feb. 21, 2003)
Defendants.	)

I. INTRODUCTION

1. On July 10, 2001, after reviewing several alternative redistricting plans, the Virginia General Assembly passed House Bill 18, the existing Congressional district plan (the "2001 Redistricting Plan"), for the Commonwealth of Virginia. Former Governor Jim Gilmore signed the 2001 Redistricting Plan into law on July 19, 2001, to be used for elections beginning in 2002.

2. Plaintiffs file this action seeking declaratory and injunctive relief to prevent the State from further using the enacted congressional plan. The plan significantly

reduces the African-American population in what was Virginia Congressional District 4 ("Fourth Congressional District"). This reduction in the African-American population's share of the Fourth Congressional District is neither necessary nor justified.

3. The new plan dilutes the voting strength of African-American voters in the Fourth Congressional District to such an extent that in the totality of the circumstances it leaves them with significantly less of an opportunity to elect a representative of their choice to the United States Congress than white voters, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

4. In addition, when measured against the former district plan, the 2001 Redistricting Plan decreases the voting efficacy of African American voters and constitutes a retrogression in their ability to elect their preferred candidates, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343; and 42 U.S.C. § 1973j(f). Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

6. Venue is proper pursuant to 28 U.S.C. §§ 1391(b)(2) because this is the district in which a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred.

III. PARTIES

7. Plaintiffs are citizens and registered voters residing in the former and present Fourth Congressional District. Plaintiffs have standing to bring this action under 42 U.S.C. § 1983 to redress injuries suffered through the deprivation, under color of state law, of rights secured by the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

8. Plaintiff Joan Hall is an African-American citizen above the age of eighteen who is registered to vote, She is a resident of the current Fourth Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 redistricting plan.

9. Plaintiff Leslie Speight is an African-American citizen above the age of eighteen who is registered to vote. She is a resident of the current Fourth Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 redistricting plan.

10. Plaintiff Vivian Curry is an African-American citizen above the age of eighteen who is registered to vote. She is a resident of the current Third Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 redistricting plan.

11. Plaintiff Elijah Sharpe is an African-American citizen above the age of eighteen who is registered to vote. He is a resident of the current Third Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 redistricting plan.

12. Plaintiff Eunice McMillan is an African-American citizen above the age of eighteen who is registered to

vote. She is a resident of the current Third Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 redistricting plan.

13. Plaintiff James Speller is an African-American citizen above the age of eighteen who is registered to vote. He is a resident of the current Third Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 redistricting plan.

14. Plaintiff Robbie Garnes is an African-American citizen above the age of eighteen who is registered to vote. He is a resident of the current Fifth Congressional District and was a registered voter in the former Fourth Congressional District prior to implementation of the 2001 Redistricting plan.

15. Defendant Commonwealth of Virginia is the entity responsible for reapportioning electoral districts for the Members of the House of Representatives of the United States elected by Virginia citizens and residents.

16. Defendant Jean Jensen, Secretary of the State Board of Elections, is responsible for the administration and supervision of the election laws of the Commonwealth of Virginia and has the responsibility for the administration and supervision of the election of members to the United States House of Representatives from the Commonwealth of Virginia. She is sued solely in her official capacity.

IV. FACTUAL ALLEGATIONS

17. According to 2000 census data, the total population of the former Fourth Congressional District was 645,733, of whom 254,167 (39.4%) were African-American. The

population of the Fourth Congressional District after the implementation of the 2001 Redistricting Plan is 643,447 of whom 215,935 (33.6%) is African-American.

18. In comparison with the prior Fourth Congressional District, the 2001 Redistricting Plan reduces the percentage of Fourth Congressional District residents who are African-American by nearly 6% of the total population and decreases the size of the African-American community within that district by 15%.

19. In comparison with the Maxwell-Crittenden plan, the Deeds plan and Congressional Plan 188, the 2001 Redistricting Plan reduces the percentage of Fourth Congressional District residents who are African-American by 19.2%, 6.7% and 6.8% respectively.

20. The African-American voters displaced by the 2001 Redistricting Plan from the Fourth Congressional District were reassigned to either the Fifth Congressional District or the Third Congressional District. Reassignment of black voters from the "old" Fourth Congressional District to the Third Congressional District dilutes African-American voting strength not only by reducing black voting strength in the Fourth Congressional District, but also by wasting the votes of African-Americans through packing into the Third Congressional District.

21. On June 19, 2001, prior to approval of the 2001 Redistricting Plan, the Commonwealth held a special election for the U.S. House of Representatives seat in the Fourth Congressional District ("Forbes/Lucas Race"). The candidates for the seat were Republican Randy Forbes ("Forbes") and Democrat Louise Lucas ("Lucas").

22. Lucas was the candidate favored by African-American voters. She won the majority vote in all but one of the

majority African-American cities and counties in the Fourth Congressional District.

23. The June 19, 2001 special election took place one week after the gubernatorial election. Because of its proximity to the larger election, the special election garnered less attention than usual. This led to an overall low voter turn-out of 38% among all voters in the district.

24. Even under the challenging conditions of running in a special election held one week after a gubernatorial vote and in a non-majority African-American district, Lucas gained 48% of the district-wide vote, only slightly less than the 52% majority vote for Forbes.

25. The Forbes/Lucas Race, along with other past election results, indicate that in the former Fourth Congressional District, African-American voters would have the opportunity to elect a candidate of their choice with some white cross-over votes in a district that is approximately 40% or greater African-American in population.

26. African-American voters in the former Third Congressional District are numerous enough and politically cohesive such that they would have an opportunity to elect a candidate of their choice in a district that is less than approximately 54% black in total population such that compliance with Section 5 of the Voting Rights Act did not require maintaining precisely the same percentage of black voters in that district as existed in the former Third Congressional District.

27. As evidenced by the Forbes/Lucas Race and other elections, African-Americans in the former Fourth Congressional District are politically cohesive in that they tend to vote as a bloc.

28. Lucas did not receive the majority vote in the majority-white areas in the district except Suffolk City. In Suffolk City, she won by only a 1.5% margin in the 53.8% majority-white city. African-Americans make up 43.5% of the population in Suffolk City.

29. Anecdotal evidence and the election results of the Forbes/Lucas race, and other elections, indicate that the white voters in the Fourth Congressional District are politically cohesive and tend to vote as a bloc in numbers sufficient usually to defeat the candidate of choice of black voters.

30. Elections in the Commonwealth of Virginia are still characterized by a racially divided electoral environment. Lucas received less support, including financial support, from members of her own party than she would have received if she had been a White Democratic candidate.

31. The voting strength of African Americans within the Fourth Congressional District has diminished since the enactment of the current plan. Under the 2001 Redistricting Plan, a critical number of Lucas's African-American voters were removed from the Fourth Congressional District. Facing this lack of a sufficient voting base, Lucas withdrew her bid for the U.S. House of Representatives in August, 2002. Consequently, the remaining African-American voters of the Fourth Congressional District were left without a candidate of their choice and in a worse circumstance than before the 2001 Congressional District Plan was enacted.

32. The 2001 Redistricting Plan decreases the number of African-Americans in the Fourth Congressional District to the point at which African-American voters no longer have any effective opportunity to elect a candidate of their choice in Congressional elections.

33. Other Congressional redistricting plans proposed to the Virginia legislature would not have diluted the voting strength of African-American voters in the Fourth Congressional District. One such plan was Congressional Plan 188. If passed, Congressional Plan 188 would have increased the African-American voting population in the Fourth Congressional District to 40.4%. This plan allowed African-American voters in the district to keep their ability to elect a candidate of choice and/or influence Congressional elections while still maintaining a majority-white Fourth Congressional District. The Deeds Plan, House bill 19, would have increased the population of African-Americans in the Fourth Congressional to 40.3% and provided African-American voters an opportunity to elect a candidate of choice to Congress. A third alternative plan, the Maxwell-Crittenden plan, would have increased the population of African-Americans to 52.8% to create an African-American majority district and provided African-American voters an opportunity to elect a candidate of choice to Congress.

34. The 2001 Redistricting Plan enacted by the Commonwealth of Virginia reduced the percentage of African-Americans in the Fourth Congressional District more than any other plan proposed during the redistricting process.

35. African-Americans in Virginia, particularly those in the Fourth Congressional District, suffer the present effects of past official discrimination. African-Americans in the Fourth Congressional District have fewer opportunities for housing, education, health care and employment than non-African Americans. African-Americans continue to fall behind the white population on common measures of socio-economic status, educational attainment, and access to the resources necessary to participate effectively in the political process.

36. As a result of past racially discriminatory election procedures, the Commonwealth of Virginia is one of sixteen states that are required to gain pre-clearance from the Department of Justice or the United States District Court for the District of Columbia prior to the enactment of new redistricting plans.

37. The Department of Justice pre-cleared the 2001 Redistricting Plan on October 16, 2001, despite a community outcry opposing the plan.

38. Under the totality of the circumstances, the 2001 Redistricting Plan denies black voters in the Fourth Congressional District an equal opportunity to elect candidates of their choice to the U.S. House of Representatives by significantly reducing the percentage of African-American voters in the Fourth Congressional District.

39. The allegations of the preceding paragraphs show that the 2001 Redistricting Plan, as passed by the Virginia General Assembly, signed into law by former Governor Jim Gilmore, used in the 2002 elections and which will be used in every Congressional election thereafter until 2012, has the effect of diluting the voting strength of African-American voters in the Commonwealth of Virginia and particularly in the Fourth Congressional District. This plan thereby denies African-American voters in the Fourth Congressional District an equal opportunity to that of whites to elect candidates of their choice to the U.S. House of Representatives, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. The plan also fragments African-American population concentrations among different districts, ignores compactness and contiguity, and unnecessarily packs African-American voters into the Third Congressional District without justification.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this action.

2. Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57, declaring that the 2001 Redistricting Plan for the Virginia Fourth Congressional District dilutes the voting strength of black voters in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

3. Issue preliminary and permanent injunctions enjoining the defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the current district boundaries for the Fourth Congressional District of Virginia, including enjoining the Defendants from conducting any elections for the U.S. House of Representatives, Virginia Fourth District, based on the 2001 Redistricting Plan.

4. Retain jurisdiction over this action until districting plans are in place that comply with the requirements of the Voting Rights Act of 1965 and give African-American voters an equal opportunity to elect candidates of choice to the U.S. House of Representatives from the Fourth Congressional District.

5. Make all further orders as are just, necessary, and proper to ensure complete fulfillment of this Court's declaratory and injunctive orders in this case.

6. Issue an order requiring the defendants to pay plaintiffs' costs, expenses and reasonable attorneys' fees incurred in the prosecution of this action, as authorized by the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988.

8. Grant such other and further relief as it deems is proper and just.

This 20th, day of February, 2003.

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Supreme Court, U.S.
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No. 04-870

IN THE

Supreme Court of the United States

JOAN HALL, *et al.*,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Whether minority plaintiffs challenging electoral districts under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b), fail to state a vote-dilution claim where they affirmatively allege that their minority group is *not* sufficiently numerous and geographically compact to constitute a majority in a single-member district, and that the group's preferred candidates therefore cannot be elected except by a political coalition of minority and nonminority voters.

PARTIES TO THE PROCEEDINGS

The names of all Petitioners are: Joan Hall, Leslie Speight, Richard Pruitt, Thomasina Pruitt, Vivian Curry, Eunice McMillan, James Speller, and Robbie Garnes.

The names of all Respondents are: the Commonwealth of Virginia; Jean Jensen, in her official capacity as Secretary of the State Board of Elections; Jerry W. Kilgore, in his official capacity as Attorney General of the Commonwealth of Virginia; Gary Thompson; Charles Brown; James Brown; James Alfred Carey; Evelyn Chandler; Clifton E. Hayes, Jr.; Quentin E. Hicks; Irene Hurst; and Wayne Osmore.

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STATEMENT OF THE CASE

1. Factual Background

Petitioners brought this action challenging the configuration of Virginia's Fourth Congressional District under the reapportionment plan (the "2001 Redistricting Plan") enacted by the Virginia General Assembly and signed into law by the Governor in 2001 based on the results of the 2000 census. The Department of Justice precleared the 2001 Redistricting Plan under Section 5 of the Voting Rights Act. Pet. App. 53a.

The configuration of the Fourth Congressional District challenged by Petitioners is inextricably tied to that of the adjacent Third District. Pet. App. 49a, 50a. Whereas the former Fourth Congressional District was close to the ideal size for Virginia congressional districts under the 2000 census, the population of the former Third District was nearly 76,000 people, or nearly 12%, below the ideal district size. Pet. App. 26a, 48a-49a. Substantial reapportionment was necessary to comply with the Fourteenth Amendment's "one person, one vote" requirement. Accordingly, the 2001 Redistricting Plan shifted a number of black residents from the former Fourth District to the Third District. Pet. App. 26a.

Before the enactment of the 2001 Redistricting Plan, blacks constituted 39.4% of the total population ("TPOP") and 37.8% of the voting-age population ("VAP") in the Fourth District. Pet. App. 3a. In the reconfigured Fourth District, blacks constitute 33.6% of the TPOP and 32.3% of the VAP. The 2001 Redistricting Plan left the TPOP and VAP figures for blacks in the Third District virtually unchanged. Pet. App. 3a-4a. In the reconfigured Third District, blacks comprise 56.8% of the TPOP and 53.2% of the VAP in the Third District, compared to 57% and 53.3% in the former Third District. Pet. App. 4a.

Petitioners filed a complaint in the Eastern District of Virginia, alleging that the Voting Rights Act required the

Fourth Congressional District to be drawn with a black population of roughly 40%—well short of a majority, and only about six percentage points higher than the enacted plan. Pet. App. 26a-27a, 45a-46a, 48a-49a. Petitioners do not allege that it is possible for both the Third and Fourth Districts to be compact, majority-black districts. On the contrary, the Complaint demonstrates that, to draw the Fourth District with even a 40% black population, it is necessary to imperil the majority-black status of the neighboring Third District. Pet. App. 26a-27a, 52a.

2. The District Court's Decision

The District Court dismissed the complaint.[1] The court explained that *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), requires a Section 2 plaintiff to show that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." Pet. App. 31a. The court noted that while *Gingles* "left open the question of whether a vote dilution claim could be brought with respect to an 'influence district'" where a minority group is too small to be a majority in a district, lower courts have "uniformly rejected such claims." Pet. App. 36a-37a. Recognizing Section 2 claims where a minority group could not constitute a majority in a district, the court held, would force courts to engage in "intrusive speculation on political matters" beyond their capacities and would raise the specter of a flood of marginal Section 2 claims. Pet. App. 44a. Because Petitioners conceded that blacks could not constitute a majority in the Fourth District, the District Court dismissed Petitioners' complaint.

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[1] The District Court held that seven of nine Petitioners lacked standing to bring a Section 2 claim because they lived outside the new Fourth District. Pet. App. 29a-30a. The Fourth Circuit did not reach this issue, Pet. App. 10a n.10, and Petitioners do not seek certiorari on this question. Pet. at 3 n.2.

3. The Court of Appeals' Decision

The Fourth Circuit affirmed unanimously. The court explained that Petitioners' vote-dilution claim required that their voting strength under the challenged plan "be measured against some reasonable benchmark of 'undiluted' minority voting strength." Pet. App. 11a. Relying on the majority opinion in *Gingles* and on Justice O'Connor's concurrence, the Fourth Circuit held that "[t]he electoral ability of a group concentrated within a hypothetical single-member district makes sense as the measure of *undiluted* minority voting strength" because "minority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district." Pet. App. 13a (emphases in original). In contrast, when minority voters cannot form a majority in a district, "they have no ability to elect candidates of *their own* choice," but must instead form political coalitions with other groups to elect candidates. Pet. App. 14a (emphasis in original). "Under these circumstances, minorities cannot claim that their voting strength—that is, the potential to independently decide the outcome of an election—has been diluted in violation of Section 2." Pet. App. 14a. "A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district," the court held, "but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution 'on account of race' in violation of Section 2." Pet. App. 18a-19a. To hold otherwise would impermissibly "transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." Pet. App. 17a-18a.

REASONS FOR DENYING THE WRIT

Contrary to the premise of Petitioners' challenge, the Voting Rights Act does not mandate that redistricting plans be designed to maximize the electoral success of a political

coalition of minority and nonminority voters. The Act guarantees only an *equal* opportunity for *minority* voters. This equal opportunity may be denied when a compact black community is split into two ineffective minorities in adjacent districts, rather than preserved as an effective majority in one. But no such injury is possible where the relevant black population is not sufficiently numerous or compact to constitute a majority in a district. In such circumstances, the redistricting plan does not deny black voters the ability "to elect" a representative of their own choice. 42 U.S.C. § 1973(b). Rather, the only "deprivation" possibly caused by the redistricting plan is the inability to influence the election of a minority-preferred candidate by forming a winning coalition with sympathetic white crossover voters. This alleged political harm, however, is not a cognizable deprivation under the Voting Rights Act because the Act does not protect minority voters' ability to "influence" elections; does not protect multi-racial *political* coalitions against vote dilution; does not grant minorities a *superior* "right" to have their preferred candidate win; and otherwise does not require redistricting plans to maximize minority-preferred candidates' potential electoral success in every district where minority voters constitute a cognizable presence.

For these reasons, this Court established, in the seminal case of *Thornburg v. Gingles*, 478 U.S. 30 (1986), that minorities must be able to constitute a majority in a compact, single-member district in order to allege vote dilution under Section 2, and an avalanche of precedents from lower federal courts has subsequently rejected any Section 2 dilution claim brought by minority voters constituting less than a potential majority. All of these decisions recognized that a minority-preferred candidate *could* win in a majority-white district with the aid of white crossover voting, but nevertheless expressly held that Section 2 does not create any *right* to have districts designed to ensure that such a potential bi-racial coalition usually wins. Consequently, Petitioners'

repeated belaboring of the obvious—that courts and commentators have frequently recognized that minority-preferred candidates *can* be elected when minorities comprise a minority of the population—is utterly beside the point and lends no support to their radical assertion that bi-racial coalitions supporting minority candidates have a statutory *entitlement* to districts in which their potential political coalition will usually win.

Because federal courts have overwhelmingly and correctly rejected Section 2 claims where plaintiffs cannot meet *Gingles*' majority-in-a-district requirement, the Court should adhere to its consistent past practice of declining to consider the viability of such "influence" claims.[2]

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[2] This Court and lower courts have often referred interchangeably to "influence" and "ability-to-elect" claims. In *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Court referred to an "influence district[]" as one "in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidate of choice." *Id.* at 150. Petitioners can find no refuge in the semantic distinction between "influence" and "ability-to-elect" claims, *see* Pet. at 4 n.4, because all of the cases enforcing the *Gingles* majority-in-a-district requirement, *see infra* at 6-9, required a majority in a district even though plaintiffs were seeking districts where the minority-preferred candidate would *prevail* and that potential was undisputed, or deemed irrelevant, because minorities could not constitute a numerical majority. The reason most courts used the "influence" terminology, rather than Petitioners' newly minted "ability-to-elect" nomenclature, is because this Court after *Gingles* routinely denoted the type of districts sought by Petitioners here as "influence districts." Thus, the Court should not attach talismanic significance to whether Petitioners' claim is labeled with the "influence" or "ability-to-elect" terminology.

Indeed, if anything, "ability-to-elect" claims are less viable than "influence" claims. This is because *Gingles* expressly held that the majority-in-a-district requirement applies where "plaintiffs alleg[e] . . . that their ability *to elect* the representatives of their choice was impaired" by the challenged redistricting plan. *Gingles*, 478 U.S. at 46 n.12 (emphasis in original). The only question reserved was whether a group

I. Overwhelming Precedent Establishes That A Section 2 Claim Fails Where The Minority Group Could Not Constitute A Majority In A District.

Five federal courts of appeal have agreed with the Fourth Circuit and rejected vote-dilution claims brought by minorities comprising less than a compact majority. Moreover, in each of these cases in which a petition for certiorari was filed, this Court denied the petition.

For example, in *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999), the Sixth Circuit rejected the claim that the Voting Rights Act compelled the creation of a single-member district with a 34% black voting-age population. 145 F.3d at 828. The court found "the plaintiffs' [claim] . . . particularly lacking because it [was] based on the premise that the Section 2 violation . . . consist[ed] of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it." *Id.* at 828-29 (emphasis in original). Earlier, the Sixth Circuit, sitting en banc, confirmed that where a single minority group cannot comprise the majority of a proposed district's VAP, minorities have no valid Section 2 objection to a redistricting plan. *Nixon v. Kent County*, 76 F.3d 1381, 1389 (6th Cir. 1996). The court explained that, to elect representatives of their choice, members of such a group would be required to form political coalitions with members of one or more other groups. *Id.* at 1391-92. Requiring districts amenable to such bi-racial coalitions would "transform[] the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly

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that is less than a majority would be able to state a claim by alleging that a plan impairs its ability to *influence* elections, *see Gingles*, 478 U.S. at 46 n.12, which Petitioners do not allege here. Thus, if one is to draw a distinction between ability-to-elect claims and influence claims in cases where the majority-in-a-district requirement is not satisfied, *Gingles* forecloses the former and leaves open only the latter.

advances contrived interest-group coalitions or racial or ethnic minorities." *Id.* at 1392 (internal citations omitted).

Similarly, the Seventh Circuit rejected a Section 2 claim that a district could be created with a black VAP between 43 and 44%. The court explained that "minorities not large and concentrated enough to comprise a majority" are "unable to sustain a Section 2 claim" even though they "possess the potential to elect candidates of their choice in a single-member district with the help of a sizable and long-standing white crossover vote." *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988) (footnote omitted), *cert. denied*, 490 U.S. 1031 (1989).

The Fifth, Ninth, and Eleventh Circuits have likewise rejected influence claims. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851, 852-53 (5th Cir. 1999) (affirming a judgment against plaintiffs where Hispanics could make up only 48.3% of a district's citizen VAP, because vote-dilution claimants are "required . . . to prove that their minority group exceeds 50% of the relevant population in [a potential] district"), *cert. denied*, 528 U.S. 1114 (2000); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (rejecting a claim based on potential districts in which Hispanics comprised less than 50% of the citizen VAP); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) ("We are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district.").

In addition, three-judge district courts have unanimously foreclosed influence claims, and this Court has repeatedly affirmed their judgments without opinion. *See Session v. Perry*, 298 F. Supp. 2d 451, 478-79, 486 (E.D. Tex.) ("[T]he State was under no § 2 obligation to create [coalition] districts [defined as "voting districts where minority voters are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a

single district in order to elect candidates of their choice"], and we find that the State labors under no corresponding compulsion to preserve these districts." (footnote and internal quotation marks omitted)), *vacated on other grounds*, 125 S. Ct. 3511 (2004); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court) (defining an influence district as "one where a distinct group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected" and holding that "influence claims are not cognizable"), *aff'd*, 540 U.S. 1013 (2003); *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court) ("Because plaintiffs cannot satisfy the *Gingles* preconditions and because we do not recognize 'influence' claims, plaintiffs cannot state a claim under the Voting Rights Act."), *aff'd*, 537 U.S. 997 (2002); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (three-judge court) ("[U]nless the minority group can establish that an effective majority-minority district can be created, a vote dilution claim is not cognizable because there is no minority voting power to dilute." (footnote omitted)), *aff'd*, 537 U.S. 1100 (2003); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) (three-judge court) (rejecting a claim that the black VAP in a district should have been higher than the 30% in the court's plan and concluding that influence claims "are inappropriate for a federal court to consider"), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *Balderas v. Texas*, No. Civ. A. 6:01CV158, 2001 WL 34104836, at *2 (E.D. Tex. Nov. 28, 2001) (three-judge court) ("To the extent the [plaintiffs] invite us to recognize and sustain a challenge to the [enacted] plan based on minority 'influence districts', we have no warrant to do so."), *aff'd*, 536 U.S. 919 (2002); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 n.22 (D.S.C. 2002) (three-judge court) (concluding that the creation of influence districts is "an inherently politically based policy" not to be considered by courts); *Turner v. Arkansas*, 784 F. Supp. 553, 569-70 (E.D.

Ark. 1991) (three-judge court) (rejecting "ability to elect" and "influence" claims when minority voters cannot form a district majority), *aff'd*, 504 U.S. 952 (1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1392 (S.D. Cal. 1989) ("[This] Court finds that there exists no legally cognizable 'influence' claim under § 2 that would require a lesser standard of proof than set forth in *Thornburg*.").

Faced with the overwhelming weight of these precedents denying influence claims, Petitioners distort numerous cases in an attempt to create the appearance of a split of authority. Pet. at 14-16. In *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three-judge court), the viability of influence districts was never in question, since the plaintiffs proposed *majority*-black districts and the court, in *upholding* the challenged plan, declined to decide "the percentage of total population, voting age population, or registered voters" that would be required to satisfy the first *Gingles* precondition. *Id.* at 1321-24. Likewise, in *Puerto Rican Legal Defense & Education Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (three-judge court), all of the districts at issue had "over a 55% VAP of the relevant minority." *Id.* at 694. In *West v. Clinton*, 786 F. Supp. 803 (W.D. Ark. 1992) (three-judge court), the court merely "*assume[d]* that the influence theory [was] legally viable" before concluding that "the facts of [the] case" did not "make out a cognizable claim under that theory." *Id.* at 806 (emphasis added). And in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (three-judge court), a case abrogated by the Sixth Circuit in *Cousin* and *Nixon*, the court based its analysis of influence claims on the premise that the *Gingles* preconditions did not apply to single-member districts, a premise subsequently rejected by this Court, *see Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

Thus, notwithstanding Petitioners' mystifying assertion that "legislative bodies and courts are increasingly uncertain about their obligations" to form districts in which minorities constitute less than 50% of the relevant population, Pet. at

18, overwhelming precedent makes clear that Section 2 plaintiffs must satisfy the majority-in-a-district requirement. Against this backdrop, only one federal court has recognized an influence claim, and even that court did so tentatively and without setting forth any standard that would govern the claim. In *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc), the divided court refused to affirm a Rule 12(b)(6) dismissal based on the plaintiffs' inability to satisfy the first necessary *Gingles* precondition. While the decision is wrong for all the reasons stated *infra* at 16-29, the opinion is more accurately characterized as a decision not to decide the issue. The court stated that it was unwilling "to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 percent." 363 F.3d at 11 (emphasis in original). The court noted, however, that "[a]s courts get more experience dealing with these cases and the rules firm up, it may be more feasible to dismiss weaker cases on the pleadings . . . ." *Id.*

It is plainly a mistake to defer resolution of the *Gingles* preconditions until after fact-finding because, as the original panel's dissenting opinion noted, "the *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of circumstances comes into play." *Metts v. Murphy*, No. 02-2204, 2003 WL 22434637, at *17 (1st Cir. Oct. 28, 2003) (withdrawn following grant of reh'g en banc) (Selya, J., dissenting) (emphasis in original). Moreover, the en banc majority leaves influence claims utterly standardless, since it provides no hint about relevant factors that would determine the viability of such claims. The court said it wanted to examine the "motive for the change in district or the selection of the present configuration, the contours of the district chosen or the feasible alternatives"—all of which go to the *purpose* behind how the district lines were drawn. 363 F.3d at 12. The whole point of the 1982 amendment to Section 2, however, was to ensure that the purpose of the line-drawers was not

dispositive, *see, e.g.*, *Voinovich*, 507 U.S. at 155, so the focus of the First Circuit is precisely wrong. Moreover, the majority stated that "plaintiffs cannot prevail merely by showing that an alternative plan gives them a greater opportunity to win the election . . . or that an otherwise justified boundary change happened to cost African-Americans a seat." 363 F.3d at 12. But the entire gravamen of the claim here is that the redistricting plan has "cost African-Americans a seat" and denied minorities an "opportunity to win the election." It is therefore quite difficult to reconcile this assertion by the First Circuit with acceptance of a claim like Petitioners', or to discern what plaintiffs might be able to show (other than purpose) that would allow them to succeed.

The sum total of the *Metts* opinion, then, is that influence claims remain a theoretical possibility, yet *Metts* provides no idea of what would constitute a viable claim. Indeed, because even *Metts* reserves the possibility of dismissing cases on the pleadings where plaintiffs fail to meet the first *Gingles* precondition, it creates no clear conflict with the overwhelming number of federal courts that have rejected such claims. But even if this Court were inclined to consider the question, it would be premature to do so before any court has articulated standards that would govern an influence claim. If the Court were to authorize influence claims, *but see infra* at 16-29, it should do so in a way that provides guidance to lower courts and to state legislatures about the duties imposed by Section 2. *Cf. Vieth v. Jubelirer*, 124 S. Ct. 1769, 1777 (2004) (plurality op.) (lamenting the Court's "inability to specify a standard" for political gerrymandering claims); *id.* at 1793 (Kennedy, J., concurring in the judgment) (noting that "clear, manageable, and political neutral standards" are "critical" to political gerrymandering claims). Unless and until courts articulate a clear standard by which valid influence claims can be differentiated from meritless ones, there is no ripe conflict among lower courts and no reason for the Court to depart from its consistent

practice of declining to rule on the viability of influence claims.

Indeed, it would be particularly dangerous to simply abandon the *Gingles* "majority-in-a-district" precondition without providing clear guidance on what new standard would emerge to establish a *prima facie* case of a Section 2 violation. This is because, as we explain more fully below, elimination of the first *Gingles* precondition creates a virtually irrebuttable mandate for proportional representation. *See infra* at 23-24. Under the second and third *Gingles* preconditions, a *prima facie* Section 2 violation is established if the candidate supported by most minority voters does not usually win and it is physically possible to create a district where that candidate would win. *See id.* Thus, under Petitioners' proposed regime, it would be presumptively illegal not to create a district favoring minority-preferred candidates, wherever feasible, and the remaining totality-of-circumstances factors would provide no inkling on whether or when such a failure to maximize might be permissible. Since elimination of the majority-in-a-district requirement impermissibly creates a *de facto* proportional representation mandate, its potential elimination necessarily needs to be accompanied by further alteration of Section 2 standards to avoid this result. But neither *Metts* nor any other case has provided any hint as to what such an adjustment might encompass, and therefore it is premature for this Court to consider this question.

II. The Facts Of This Case Make It Particularly Unsuitable To Decide Whether The *Gingles* Preconditions Should Be Altered To Permit Influence Claims.

Not only has no federal court articulated a standard for assessing the viability of influence claims, but Petitioners themselves offer no alternative beyond a grab bag of amorphous factors—"real-world variables such as plurality vote requirements, primary elections, political cohesiveness,

and voter turnout" that may make it possible for "less-than-50% minority groups . . . to elect candidates of their choice." Pet. at 8. Petitioners' "flexible, fact-specific standard" amounts to nothing more than a "totality of the circumstances" test, *id.* at 22, 24, that eviscerates the purpose of the *Gingles* preconditions—to weed out meritless claims *before* the totality of the circumstances comes into play, and to prevent Section 2 from becoming a mandate for proportional representation.

In any event, because none of the factors identified by Petitioners as being theoretically relevant are present here, this case is a poor vehicle for this Court to consider influence claims. First, Petitioners argue that "under certain factual circumstances, less-than-50% minority groups could have the ability to elect without *any* white crossover voting." *Id.* at 21 (emphasis in original). Whatever these factual circumstances may be, they are not at issue here, as Petitioners themselves allege that blacks in the Fourth District can *only* elect their preferred candidate with the aid of white crossover voting. Pet. App. 5a, 46a, 51a.

Second, Petitioners allege that "less-than-50% minority groups" "have the ability to elect" by a *plurality* in a race involving more than two candidates. Pet. at 20. But Petitioners have not alleged that there will be a three-way race in this case or that minorities would be unable to elect their preferred candidate in the *challenged* district if there were such a multi-candidate race. Moreover, a three-way race affords no reasonable basis for distinguishing *Gingles*, in which the Court was obviously aware of the potential for such a race when it erected the majority-in-a-district requirement. It did so because vote dilution deals with "structural" barriers that need to be assessed in terms of the "usual" situation, not "special circumstances," such as a three-candidate race which will lead to "the success of a minority candidate in a particular election." 478 U.S. at 51, 57. There is no basis to depart from the majority-in-a-district rule based on speculation about results that might occur in a

three-candidate contest that has never occurred and is not alleged to be plausible in the future. *See McNeil*, 851 F.2d at 944 ("Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations.").

Third, Petitioners argue that in some instances, a minority group that is not a majority may still constitute more than 50% of a particular political party. That minority group, Petitioners argue, can decide the winner of that party's primary, who, in turn, can win the general election with white crossover votes. Pet. at 20-21. Again, however, Petitioners' hypothetical has nothing to do with this case or the decision below. Petitioners do not allege that the Fourth District as drawn deprives them of the opportunity to win the Democratic primary. Rather, they allege that blacks cannot win a *general* election against a predominantly white, Republican electorate. Pet. App. 49a-51a. Thus, it is undisputed here that blacks will constitute a minority of voters in the dispositive election and that a black-supported candidate will need substantial white support to prevail. Petitioners' academic speculation about different districts where white support might not be necessary is therefore entirely beside the point here.

In short, Petitioners' Section 2 claim fails even under their own speculative factors for assessing an influence claim. In addition, Petitioners' complaint is legally insufficient for another reason: Section 2 requires a showing that members of a protected minority group have "less opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). This Court has held that "[i]t would distort the plain meaning of [Section 2] to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (footnote omitted). Yet the complaint refers only to minority voters' opportunity to elect candidates of their

choice, without any suggestion that minority voters lack a full opportunity to participate in the political process. Pet. App. 46a, 53a. Thus, even if Petitioners were to prevail with respect to the opportunity to elect, they would be entitled to no relief because they have not alleged that minority voters lack the opportunity to participate in the political process.

Finally, Petitioners make much of the Justice Department's purported support for influence claims. Pet. at 24-26. But as Petitioners tacitly acknowledge, *see id.* at 26, the Justice Department urged this Court to *reject* influence claims in its amicus brief in *Voinovich v. Quilter*, 507 U.S. 146 (1993). Citing the overwhelming precedent disallowing influence claims, the Government expressed its "agree[ment] with those courts that have rejected [the] notion" that "Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." Brief for the United States as *Amicus Curiae*, *Voinovich v. Quilter*, No. 91-1618, 507 U.S. 146 (1993) (emphasis in original). Thus, the one time the Government urged the Court to recognize influence claims, the Court declined to consider the question, and the Government has elsewhere taken the opposite position. Cases since *Valdespino* and following the 2000 census, moreover, have overwhelmingly confirmed the need to comply with *Gingles*' majority-in-a-district requirement and been affirmed by this Court. *See Parker*, 263 F. Supp. 2d at 1104-05; *O'Lear*, 222 F. Supp. 2d at 861; *McConnell*, 201 F. Supp. 2d at 643 n.22; *Cano*, 211 F. Supp. 2d at 1231; *Smith*, 189 F. Supp. 2d at 537. If the Justice Department is, as Petitioners suggest, a bellwether of when a voting-rights question merits the Court's attention, the Department's silence in this case reaffirms that the lower courts are in accord and that the Court should deny the instant petition for certiorari.

III. The Decisions Below And The Overwhelming Precedent Are Correct.

A. Petitioners' Claim Is Foreclosed By The Statute's Plain Language.

The majority-in-a-district requirement is mandated by the language of Section 2. Under the statute, it must be "shown" that (1) a citizen's right to vote is impaired "on account of *race*," in that members of a "*protected*" "class of citizens" "have *less* opportunity than other members of the electorate . . . to *elect* representatives of their choice," and (2) the challenged practice "*results*" in this inequality. 42 U.S.C. § 1973(a) & (b) (emphasis added). Plaintiffs must prove that, but for the challenged plan, minority voters would have been able to elect representatives of their choice. *Gingles*, 478 U.S. at 50 n.17. Otherwise, the plan "cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50; *accord Cano*, 211 F. Supp. 2d at 1231 (claim of minority vote dilution not possible if "there is no minority voting power to dilute").

In *Gingles*, the Court squarely held that if "the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to *elect* representatives of their choice in the absence of the" practice under attack. 478 U.S. at 50 n.17 (emphasis added). At best, such a minority group can allege "that the [challenged practice] impairs its ability to *influence* elections" by joining multi-racial political coalitions. *Id.* at 46 n.12 (emphasis in original); *accord Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994) (where "members of a minority group are a minority of the voters," they allege that their group is "potentially influential"); *Voinovich*, 507 U.S. at 154 (voters allege "influence-dilution" where they "do not allege that [the challenged plan] prevented black voters from constituting a *majority* in additional districts" (emphasis in original)); *Growe*, 507 U.S.

at 41 n.5 ("a minority group not sufficiently large to constitute a majority" alleges an "ability to influence, rather than alter, election results"). Accordingly, the majority-in-a-district showing is the first "necessary precondition[]" of a claim that a challenged practice deprives black voters of the ability to *elect* the candidates of their choice. *Gingles*, 478 U.S. at 50.

As Petitioners concede, Pet. at 20, the Court *always* has recognized that candidates preferred by a group of minority voters, however small, can be elected with the support of white voters. *See Gingles*, 478 U.S. at 89 n.1 (O'Connor, J., concurring in judgment); *De Grandy*, 512 U.S. at 1020 ("[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect their candidates of their choice."); *Voinovich*, 507 U.S. at 154 (black voters that do not constitute a district majority "could not dictate electoral outcomes independently," "[b]ut they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters"). One of the challenged districts in *Gingles* itself consistently had elected a black candidate even though blacks constituted only 36.3% of the population. 478 U.S. at 77, 74 & n.35. Indeed, under *Gingles*, the absence of such victories for minority-preferred candidates is an *additional* precondition for vote-dilution claims. *See id.* at 56 (no Section 2 claim where "the combined strength of minority support plus white 'crossover' votes" usually prevails over a white majority under the challenged plan).

Thus, in clearly holding that a group too small to be a district majority "cannot maintain that they would have been able to elect representatives of their choice," *Gingles*, 478 U.S. at 50 n.17, the *Gingles* Court necessarily concluded that the opportunity "to elect" protected by Section 2 is the ability of a protected class "to elect a representative of its *own* choice," by "dictat[ing] outcomes independently."

Growe, 507 U.S. at 40 (emphasis added); *Voinovich*, 507 U.S. at 154; *see also Gingles*, 478 U.S. at 67-68 ("Section 2(b) states that a violation is established if it can be shown that members of a protected minority group 'have less opportunity than other members of the electorate to . . . elect representatives *of their choice*.'" (quoting 42 U.S.C. § 1973) (emphasis added in *Gingles*)); Pet. App. 14a-15a. Petitioners' argument to the contrary rests on the fundamentally mistaken premise that minority voters have a statutory right to the election of their preferred candidates. On the contrary, "[t]he objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability 'to elect its candidate of choice on an equal basis with other voters.'" Pet. App. 16a (quoting *Voinovich*, 507 U.S. at 153).

When a districting plan denies black voters the numbers they need to form a winning coalition with white voters, the plan deprives the *entire* coalition, black *and* white, of the ability to elect its preferred representatives. Such a plan does not "result[]" in vote dilution "on account of *race*" and does not cause black voters to have "*less* opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(a) & (b) (emphasis added). Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial groups are. And members of a racial group are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition, because *no* racial group (or group defined by any other characteristic) has a right to form a winning coalition. Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others. If a plan impairs votes not "on account of race" but on account of membership in a political coalition, the plan does not violate Section 2.

See, e.g., Whitcomb v. Chavis, 403 U.S. 124, 153 (1971) (no vote-dilution claim when a minority group, "*along with all other Democrats*, suffers the disaster of losing too many elections" (emphasis added)); *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting) (no Section 2 claim where minorities' "lack of success at the polls was the result of partisan politics, not racial vote dilution"); Pet. App. 17a-19a.

B. Petitioners' Claim Also Conflicts Irreconcilably With The Purpose Of Section 2.

Petitioners' claim runs afoul of not only the statutory language but also its unmistakable purpose to protect *racial* groups. Pet. App. 18a ("The Voting Rights Act is a balm for racial minorities, not political ones—even though the two often coincide." (internal quotation marks omitted)). Experience in the lower courts confirms that a "coalition" claim simply seeks advantage for a political party to which minority voters belong. *See, e.g., McConnell*, 201 F. Supp. 2d at 643 n.22 (claim seeks 25% to 40% black districts because "[w]ith the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a [Democratic candidate can] . . . use the black vote to defeat any Republican challenger in the general election"); *Smith*, 189 F. Supp. 2d at 537 (claim reduces to argument "that more minorities are required in [a district] to make the congressional race more competitive for democratic candidates"). Indeed, Petitioners' own counsel acknowledges that these claims are driven by party operatives who attempt—with uneven success—to gain support from minority politicians. *See* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 455 (2000) (stating that "the Democratic Party will seek to work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority"). As one court of appeals aptly put it, the plaintiffs in these cases are "indistinguishable from political minorities

as opposed to racial minorities." *Nixon*, 76 F.3d at 1392 (internal citations omitted).

Thus, "coalition" claims are not cognizable under Section 2 for the simple reason that "[t]he Act's purpose is not to ensure the election of candidates ... of any particular political party." *Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996). No exception to this rule exists where a political party is supported by a minority group. *See, e.g., Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon*, 76 F.3d at 1392 (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members."). Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others.

Courts, moreover, are ill-equipped to decide which of two plans will elect more minority-preferred candidates. It was recognized as early as *Gingles* that shifting black voters between districts has an inherently unpredictable effect on the number of black-preferred candidates elected. *See* 478 U.S. at 87-89 (O'Connor, J., concurring in judgment); *accord Georgia v. Ashcroft*, 539 U.S. 461, 480-82 (2003). Petitioners' claim illustrates this point perfectly. According to Petitioners, Section 2 *requires* the black population of one district to be increased from 34% to 40%, largely by shifting black voters *out* of Virginia's only majority-black congressional district, which has a black voting-age population of only 53.2%. Pet. App. 3a-5a, 42a. By "spreading out minority voters over" the two districts, Petitioners' proposal might result in the election of minority-preferred representatives from both districts. *Georgia*, 539 U.S. at 481. "It also, however, creates the risk that the

minority group's preferred candidate may lose" in *both* districts. *Id.*; *accord* Pet. App. 42a.

As then-Judge Breyer observed, entertaining claims like Petitioners' "would require courts to make the very finest of political judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986). The district court here emphasized:

> Plaintiffs allege that a 34 percent black population in the Fourth District denies black voters their basic voting rights but an 'approximately 40%' black population would guarantee those rights. Thus, the Court will be required to find that this six percent differential is of critical significance, because white crossover voting is enough to elect a black-preferred candidate at 40 percent, but plainly insufficient at 34 percent.

Pet. App. 41a (footnote omitted). At the same time, Petitioners allege that a corresponding *reduction* of black population by approximately *seven percent* in the adjacent district, which is Virginia's first majority-black district, would have *no* effect. *See id.* at 42a; *see also id.* at 4a, 26a-27a & n.4. Thus, in adjudicating the type of claim advanced by Petitioners, courts would be asked to decide whether the slightest of population shifts has a dispositive effect in one district and no impact in another. The Voting Rights Act does not authorize claims that would require counterintuitive prognostications with a level of certainty that no court can achieve.

Nor, as Petitioners urge, would recognizing influence claims "encourage the transition to a society where race no longer matters." Pet. at 29 (quoting *Georgia*, 539 U.S. at 490-91). Race-consciousness is not *decreased* if legislators are required to adjust racial percentages in districts where blacks are present in sufficient numbers to "influence" electoral outcomes. If legislatures must constantly tinker with black percentages to avoid liability, then virtually no

redistricting decision will be made where race is not a predominant factor (in violation of the color-blind commands of *Shaw v. Reno*, 509 U.S. 630 (1993)). Nor is the federal judiciary equipped, or authorized under *Georgia*, to dictate to state legislatures on whether racial harmony is better enhanced in a 34% black district than it would be in a 40% black district mandated by judicial fiat.

Moreover, racial harmony is hardly enhanced when the interests of one minority group are subverted to further those of another minority group. In *Metts*, for example, the district challenged had a 21.4% black population and a 46.7% Hispanic population. This had altered the preexisting district from 25.7% black and 41% Hispanic. Perhaps as a consequence, a Hispanic challenger defeated the black incumbent and went on to win the election in the new district. 363 F.3d at 9. Following the en banc opinion in *Metts*, the State settled the case by increasing the black population back to 26%. Pet. at 13. In the next election, a black candidate was elected instead of the Hispanic in the district. *See* Pet. at 13 *citing* http://www.elections.ri.gov/2004GE/SenateDis6.htm; http://www.elections.ri.gov/2004Primary/SenateDis6.htm. The net result of *Metts*, then, was to authorize the lower court to deprive Hispanic voters, who constituted the bulk of the district, of their new electoral opportunity and return power to the smaller black group that had enjoyed representation during the prior decade. Neither the *Metts* court nor Petitioners provide any inkling of why modifying legislative choices in order to elevate blacks over another minority group furthers racial harmony or is authorized by the Voting Rights Act.

C. Petitioners' Claim Improperly Would Authorize Section 2 Lawsuits Wherever Minority-Supported Candidates Lose Elections.

Petitioners directly concede that their theory would eliminate the first *Gingles* precondition entirely, and there is no merit to their assurance that claims may "easily be

rejected" under "the second and third *Gingles* prongs, and [under] the totality of circumstances factors." Pet. at 28. To the contrary, the district court recognized that "[m]embers of any protected minority group could always launch a lawsuit to increase their presence in a district from 15 percent to 20 percent, or from 20 percent to 25 percent, and argue that this increase will cause their candidate to prevail" in a district where, for example, the Democratic candidate previously received 45-46% of the vote. Pet. App. 40a. In these circumstances, the second *Gingles* precondition would be satisfied by the minority group's cohesive support for Democrats, and the third *Gingles* precondition would be satisfied by the usual defeat of the Democratic candidate. *See Gingles*, 478 U.S. at 56 ("[I]n general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting.").

It is utterly absurd to argue that recognizing influence claims—and eliminating the first *Gingles* precondition, the principal bulwark against proportional representation and against frivolous Section 2 claims—would somehow "reduce the amount of Section 2 litigation brought by less-than-50% minority groups." Pet. at 18-19. Contrary to Petitioners' claim, Pet. at 28, the floodgates would not be obstructed by plaintiffs' need to prove that their political coalition could prevail under an alternative plan. This "requirement" is nothing more than a restatement of the third *Gingles* prong, which itself requires that the challenged plan causes the minority group's preferred candidates usually to lose elections that they otherwise usually would win. Petitioners effectively are saying that maximization is required "only" when maximization is *possible*—hardly a serious limitation on their proffered maximization rule.

Moreover, Petitioners' vote-dilution theory would entail judicial second-guessing and mandatory redrawing of district lines in areas that do not present the sort of "racial and ethnic cleavages" in the electorate that the Voting Rights Act was

designed to eradicate. *De Grandy*, 512 U.S. at 1020. If, as Petitioners claim, the area encompassing the challenged district is one in which black candidates can be elected in a 40% black district, then this is an electorate where white voters will willingly support a black candidate and that therefore does not present the sort of racial bloc voting problem that Section 2 is designed to correct. This is in stark contrast to the districts at issue in *Gingles* and elsewhere, in which whites would not vote for minority candidates and thus there was a demonstrable need for minorities to constitute a majority in order for them to elect their preferred candidate. Hence, the ultimate perversity of Petitioners' proposed rule is that it would *penalize* those areas where voters do engage in colorblind voting on the merits, such that minority candidates can be elected through the aid of substantial white crossover voting. On the other hand, it would leave untouched those areas where whites continue to refrain from voting for candidates of a different race because, in those jurisdictions, plaintiffs will not be able to argue that minority-preferred candidates can be elected, since there will be no white crossover voting to aid minorities in their proposed bi-racial coalition.

This is well illustrated by the recent *Metts* case in the First Circuit, where black voters had the potential to constitute only 26% of a district. By alleging that their multi-racial political coalition had the potential to elect its preferred representatives, the plaintiffs necessarily were contending that the white and Hispanic crossover rate w s at least *32%*, meaning that *more* non-black voters than black voters were voting for black-preferred candidates. *See* 363 F.3d at 13 (Selya, J., dissenting). Thus, Petitioners ask the Court to authorize *greater* judicial interference in the areas where racially polarized voting is *less* of a problem. Such a rule would be intolerable under "a statute meant to hasten the waning of racism in American politics." *De Grandy*, 512 U.S. at 1020.

Petitioners' *de facto* elimination of the first *Gingles* precondition effectively would require creation of districts where a minority group's preferred representatives are usually elected, at least up to the point of proportionality between the percentage of such districts in the jurisdiction and the group's percentage of the jurisdiction's population. A Section 2 plaintiff would be able to establish a nearly irrebuttable *prima facie* case by showing that whites outvote a cohesive minority group, and courts would be required to impose an alternative redistricting scheme that allows the minority's political coalition to outvote the white majority. The *Gingles* preconditions do not technically establish a Section 2 violation, since the "totality of circumstances" must be further analyzed. *See De Grandy*, 512 U.S. at 1011. But, in practice, the totality-of-circumstances factors have not often been the basis for denial of Section 2 claims. *See id.* at 1012 ("lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors"). The only reliable defense would be that proportionality has been achieved under *De Grandy*, *see id.*, thus confirming that Petitioners' theory requires representation up to the point of proportionality.

In fact, *Gingles* specifically stated that the *purpose* of the majority-in-a-district requirement is to foreclose a proportionality rule: The "reason" that Section 2 authorizes vote-dilution claims only "in districts in which members of a racial minority would constitute a majority of the voters" is to insure that Section 2 will "only protect racial minority votes from diminution proximately caused by the [re]districting; [but] *would not assure racial minorities proportional representation.*" 478 U.S. at 50 n.17 (emphasis in original; internal quotation marks omitted). As Justice O'Connor's concurring opinion explained, the majority-in-a-district requirement is a thin barrier against a proportionality rule because, under the framework adopted by the Court, proportionality usually will be required whenever geography

permits the creation of majority-black districts in proportion to the black population percentage. *Id.* at 91-92 (O'Connor, J., concurring in judgment). Justice O'Connor's opinion, moreover, argued that the majority's standards "come *closer* to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 94 (emphasis added). The *Gingles* concurrence thus provides an even stronger basis than the majority opinion for rejecting Petitioners' effort to *eliminate* the majority-in-a-district obstacle to a proportionality mandate. The *Gingles* Court unanimously concluded that Section 2's prohibition of a proportionality rule necessitates either the majority-in-a-district requirement or a *higher* threshold for vote-dilution claims.

Gingles also refutes Petitioners' assertion that the Senate Report on amended Section 2 requires courts to explore the totality of the circumstances in every case. *Gingles* itself "rel[ied] heavily on the Report," Pet. at 23, and nevertheless established three "necessary preconditions" to Section 2 vote-dilution claims. 478 U.S. at 50. To be sure, for a finding *in their favor*, plaintiffs must show vote dilution "in the context of all the circumstances," S. Rep. No. 97-417, at 27 (1982), *quoted in* Pet. at 23, but this does not suggest that a court cannot "provide[] some structure to the statute's 'totality of circumstances' test" by recognizing threshold elements. *De Grandy*, 512 U.S. at 1010; *see also id.* at 1011 ("[I]f *Gingles* so clearly identified the three [preconditions] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combinatio[illegible] . . . .").

Nor is it true that Section 2 claims must be allowed wherever minorities suffer political defeats because the majority-in-a-district requirement is an "arbitrary" or necessarily inflexible "numerical cutoff." Pet. at 24. Far from being arbitrary, the 50% figure identifies the point at which the minority group cannot possibly need white crossover votes to elect their candidates of choice. For all the reasons discussed above, that point is central to the

statute's protection of racial groups, not multi-racial political ones. Furthermore, this case does not present the issue whether the 50% figure should be based on total population, as opposed to voting-age population or citizen voting-age population. *See, e.g., De Grandy*, 512 U.S. at 1008. Similarly, as Petitioners themselves point out, Pet. at 20, it might be shown in a particular jurisdiction that, due to the consistent presence of more than two candidates, a group need not constitute 50% of voters in order to provide all of the votes that the winning candidate will need. In this case, however, the complaint plainly states that black voters would require "some white cross-over votes" to elect their preferred candidates. Pet. App. 50a; *accord* Pet. at 2. This case therefore presents only the issue whether the Court should eliminate the first *Gingles* precondition in favor of a rough proportionality rule.

D. *Georgia v. Ashcroft* Does Not Authorize Influence Claims.

Georgia v. Ashcroft, 539 U.S. 461 (2003), confirms that the Act does not require the creation of influence districts. *Georgia* authorized state legislatures, even under the stringent requirements of Section 5 of the Voting Rights Act, to *voluntarily* create influence districts in place of majority-minority districts. That influence districts are *permissible*, however, in no way suggests that state legislatures are *required* to create them under the Voting Rights Act.

Indeed, *Georgia* substantially *enhanced* state legislative autonomy to redistrict free from federal judicial interference. Although Section 5, unlike Section 2, bluntly "insure[s]" preservation of "current minority voting strength," states are nevertheless free to *reduce* the number of majority-minority districts, creating "fewer minority representatives" and more districts where "minority voters may not be able to elect a candidate of choice." *Id.* at 482. Such redistricting decisions, this Court explained, constitute a "political choice," and state legislatures, not federal courts, are

empowered to "choose one theory of effective representation over the other." *Id.* at 482-483. This Court held:

> In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. *See Thornburg v. Gingles*, 478 U.S. at 48-49; *id.* at 87-89 (O'Connor, J., concurring in judgment). Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice. *See id.*, at 88-89 (O'Connor, J., concurring in judgment); *cf.* Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517 (2002).
>
> Section 5 does not dictate that a State must pick one of these methods of redistricting over another.

Id. at 480.

Thus, Petitioners' argument that *Georgia* authorizes influence districts "turns the principle of *Georgia v. Ashcroft* on its head." *Session*, 298 F. Supp. 2d at 485. *Georgia* "gave states *greater* latitude in complying with the Voting Rights Act," and thus cannot be read as "fencing even more territory from state legislative reach." *Id.* (emphasis added). Since it is now clear that, even under the blunt commands of Section 5, federal courts may not require states to preserve existing majority-minority districts where minorities can elect their preferred candidates, because the Voting Rights Act leaves such a political choice to legislatures, *a fortiori* federal courts cannot dictate the preservation or creation of *influence* districts, on the theory that Section 2 mandates that *any* cognizable group of minority voters must *always* be able to elect a candidate of choice.

Petitioners make the bizarre assertion that since *Georgia* allows states to point to influence districts as a defense to

Section 5 liability, it somehow follows that Section 2 *requires* the creation of influence districts. Pet. at 27. But the fact that a state need not blindly create majority-minority districts, but may choose less-than-majority districts if sufficient to empower minority voters, hardly suggests that federal courts may require such influence districts *in addition* to the majority-minority district(s) the state has created. Any such rule would fly in the face of the "political" choice entrusted to the states under *Georgia*, and of this Court's longstanding recognition that states are entitled to deference in deciding how to ensure minorities the opportunity to participate in the political process. *See Georgia*, 539 U.S. at 481-82; *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) (federal interference with state districting "represents a serious intrusion on the most vital of local functions"); *Connor v. Finch*, 431 U.S. 407, 414 (1977) (reapportionment "is primarily a matter for legislative consideration and determination"); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State"). Moreover, it is illogical to suggest that aspects of a districting plan that aid in its defense are somehow required. For example, although legislatures are free to seek proportionality and may cite proportional representation as a defense to a Section 2 claim, Section 2, by its terms, does not *require* such proportionality. *See De Grandy*, 512 U.S. at 1220.

Thus, while *Georgia* recognizes again the obvious electoral reality that minority-preferred candidates can succeed in districts where blacks constitute less than a majority, it did not *require* the creation of influence districts because the Voting Rights Act does not ensure the success of candidates supported by a bi-racial political coalition.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

JOAN HALL; RICHARD PRUITT; THOMASINA PRUITT; VIVIAN CURRY; EUNICE MCMILLAN; JAMES SPELLER; ROBBIE GARNES; and LESLIE SPEIGHT,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA; JEAN JENSEN, in her official capacity as Secretary of the Virginia State Board of Elections Secretary; JUDITH WILLIAMS JAGDMANN, in her official capacity as Attorney General of Virginia; GARY THOMPSON; CHARLES BROWN; JAMES BROWN; JAMES ALFRED CAREY; EVELYN CHANDLER; CLIFTON E. HAYES, JR.; QUENTIN E. HICKS; IRENE HURST; and WAYNE OSMORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, JEAN JENSEN, AND JUDITH WILLIAMS JAGDMANN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When minority voters cannot constitute a majority in a single-member district, may they maintain a claim that a State's redistricting plan dilutes their ability to elect their candidates in violation of § 2 of the Voting Rights Act?

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BRIEF IN OPPOSITION

The Respondents, the Commonwealth of Virginia, Jean Jensen, in her official capacity as Secretary of the Virginia State Board of Elections, and Judith Williams Jagdmann, in her official capacity as Attorney General of Virginia (collectively "Virginia"), respond to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.[1] The Fourth Circuit, following *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) and its progeny, held that when minority voters cannot constitute a majority in a single-member district, minority voters *may not maintain* a claim that a State's redistricting plan dilutes their ability to elect their candidates in violation of § 2 of the Voting Rights Act. For the reasons set out below, the Writ of Certiorari should be denied.

STATEMENT OF THE CASE

1. Almost twenty years ago, this Court established certain preconditions that minority voters must meet before filing a claim under § 2 of the Voting Rights Act ("§ 2"), 42 U.S.C. § 1973. *See Gingles*, 478 U.S. at 50. Among other requirements, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at

[1] On February 1, 2005, Judith Williams Jagdmann succeeded Jerry W. Kilgore as Attorney General for the Commonwealth of Virginia. "When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party." Sup. Ct. R. 35.3. The Clerk of this Court was notified of the succession by letter.

50. "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). By requiring that minority voters demonstrate that they could be a numerical majority in a single-member district, this Court ensures that minority voters are capable of electing a candidate *without assistance from non-minority groups*. *See Gingles*, 478 U.S. at 90-91 (O'Connor, J., concurring) (emphasis added). *See also Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) ("One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."). Quite simply, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis original).

In the present matter, it is undisputed that the minority voters cannot form a numerical majority in a single-member district. *See Pet.* at 6. Because this Court has never excused minority voters from the requirement that they constitute a majority in a single-member district, the Petitioners' § 2 claim must fail as a matter of law. Indeed, both the district court and the court of appeals reached this conclusion. *See App.* at 19a, 24a, 32a, 43a.

a. Nevertheless, the Petitioners, a group of African-American voters who reside in Virginia's Fourth Congressional District, assert that they should be allowed to maintain a § 2 claim to challenge Virginia's 2001 congressional redistricting plan. The Petitioners' theory focuses

not on the presence of an African-American majority, but on the difficulty of forming a majority coalition of African-Americans and non-African-Americans to elect the candidate of the African-Americans' choice.[2] *See Pet.* at 4, 8.

b. The Petitioners' theory appears to be nothing more than an "ability to influence" claim under § 2. Although the Petitioners admit that African-Americans cannot constitute a majority in the Fourth Congressional District, the Petitioners contend that Virginia's 2001 redistricting plan – which reduces the African-American voting age population by just six percent – somehow deprives them of the ability to elect a candidate of their choice with the help of "crossover voting" from non-African-Americans. *See Pet.* at 3-4. Such a contention is remarkably similar to this Court's description of "ability to influence" claims under § 2. *See Voinovich v. Quilter*, 507 U.S. 146, 150 (1993) ("Ability to influence" districts are "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice."). Thus, it is logical to characterize the Petitioners' claim as an "ability to influence" claim. By summarily affirming *Parker v. Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio) (three-judge court), *summarily aff'd*, 540 U.S. 1013 (2003), this Court, at least implicitly, established that "ability to influence" claims are not viable.[3] *See Mandel v. Bradley*,

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[2] Indeed, it appears that the Petitioners' interpretation of § 2 actually requires that affirmative measures be taken to maximize the influence of minority voters. Although African-Americans were less than 40% of the voting age population in the Fourth Congressional District prior to redistricting, the Petitioners demanded that the district court create a district that was at least 40% African-American. *Pet.* at 4. *App.* at 26a, 27a, 33a.

[3] *Parker* involved a § 2 challenge to an apportionment plan for electing the Ohio General Assembly. *See Parker*, 263 F. Supp. 2d at

(Continued on following page)

432 U.S. 173, 176 (1977) ("Summary affirmances . . . without doubt reject the specific challenges presented in the statement of jurisdiction. . . .").

c. However, the Petitioners explicitly disclaim any attempt to bring an ability to influence claim. *See Pet.* at 4 n.4. Indeed, they assert that there is a fundamental difference between an "influence district," which they define

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1102. Like the Petitioners here, the plaintiffs in *Parker* tried to convince the court that the first *Gingles* precondition does not apply "where a distinct [minority] group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected." *Id.* at 1104. *Parker* rejected this argument and ruled that influence claims are not cognizable because the first *Gingles* precondition is mandatory. *See Id.* at 1105; *Id.* at 1108 (Graham, J., concurring). Indeed, as one member of the Court stated:

> If influence claims are permitted, then any system of districting, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can "influence" the result of elections. This would transfer the principle of "one man – one vote" into "one group – one election victory."

Id. at 1108 (Graham, J., concurring).

On direct appeal to this Court, the minority voters asked this Court to review a question that is virtually identical to the question presented by the Petitioners in this matter. Specifically, the *Parker* appellants framed the issue as:

> Whether Section 2 of the Voting Rights Act . . . permits minority voters to maintain a claim for vote dilution under the Act when minority voters constitute less than a majority of the voting age population, but are sufficient in number and politically cohesive to be able to otherwise elect their preferred candidate . . . under a different redistricting scheme in conjunction with like-minded non-minority voters within the same geographically compact area.

Jurisdictional Statement at i, *Parker v. Ohio*, 540 U.S. 1013 (2003) (No. 03-411). Confronting the issue whether "influence" districts are cognizable under the Voting Rights Act, this Court summarily affirmed the judgment in *Parker*. *See* 540 U.S. 1013 (2003).

as a situation where minorities can influence the outcome of an election, but cannot elect the candidate of their choice, and a "coalitional district," where minorities in conjunction with voters of other races may actually elect the candidate of the minorities' choice. *See Id.* Consequently, the Petitioners insist that their claim involves a coalitional district and, thus, is properly characterized as an "ability to elect" claim.

d. Quite simply, there is no meaningful distinction between an "ability to influence" claim and a Petitioners' "coalitional majority ability to elect" claim. However, regardless of whether the Petitioners' theory is characterized as "ability to influence" or "ability to elect," the fact remains that the Petitioners are seeking to bring a § 2 claim when they cannot form a majority in a single-member district. This Court has never excused minority voters from the requirement that they constitute a majority in a single-member district. Thus, the Petitioners effectively are inviting this Court to rewrite its § 2 jurisprudence. This Court should reject that invitation.

2.a. The factual background for this Petition is relatively straightforward. The results of the 1990 Census entitled Virginia to an additional seat in the U.S. House of Representatives. *See Moon v. Meadows*, 952 F. Supp. 1141, 1143 (E.D. Va. 1997). In 1991, Virginia enacted legislation redrawing the Third Congressional District so that African-Americans comprised a majority of both the total population and the voting age population. *See Id.* at 1144. Specifically, African-Americans comprised 64% of the total population and 61.2% of the voting age population. *Id.* In drawing a district where African-Americans were the majority, Virginia was motivated, in part, by its desire to comply with § 2. *See Id.* at 1149. Following the redrawing

of the Third Congressional District, Robert Scott, an African-American, won election to Congress in 1992, *see Id.* at 1144, and has been reelected in every subsequent election.

After Virginia redrew the Third Congressional District so that it had an African-American majority, the Fourth Congressional District, which is generally adjacent to the Third Congressional District, contained a significant African-American population. Specifically, as of 2000, African-Americans constituted 39.4% of the total population and 37.8% of the voting age population. Prior to the 1991 redistricting, the Fourth Congressional District was represented by Congressman Norman Sisisky, a Caucasian and a Democrat. Congressman Sisisky won reelection in the redrawn Fourth Congressional District throughout the 1990's.

In 2001, Virginia enacted its redistricting plan in response to the 2000 Census, and Congressman Sisisky died. In the ensuing special election, Randy Forbes, a Caucasian and a Republican State Senator, defeated Louise Lucas, an African-American and a Democratic State Senator, by a margin of 52% to 48%. Given that a Democrat had represented the Fourth Congressional District for many years, it is unsurprising that the Democratic candidate who had served in the General Assembly for many years would run a competitive race in the special election.

b. The results of the 2000 Census indicated that the population of the Third Congressional District, the one

with an African-American majority, was 12% lower than the size of an ideal Virginia congressional district.[4] Thus, under the terms of this Court's decisions, Virginia was required to move voters from other Congressional Districts to the Third Congressional District. Moreover, the African-American population had declined to 57% of the total population and 53.3% of the voting age population. Virginia considered several alternative redistricting plans – none of which would have created an African-American majority in both the Third and Fourth Congressional Districts. *See App.* at 19a, 26a, 27a. Indeed, as the Petitioners concede, it is impossible to draw the lines so that there is an African-American majority in both the Third and Fourth Congressional Districts. *See App.* at 6a. Being unable to create a *second* African-American majority district in the Fourth Congressional District, Virginia ultimately enacted a redistricting plan that resulted in a Third Congressional District with an African-American voting age population of 53.2% and a Fourth Congressional District with an African-American voting age population of 32.3%. *See App.* at 3a-4a, 25a-25a. In other words, under the new plan, the African-American share of the voting age population remained essentially the same in the Third Congressional District (53.3% to 53.2%) and declined slightly in the Fourth Congressional District (37.8% to 32.3%). The U.S. Department of Justice precleared Virginia's redistricting plan. *See App.* at 25a.

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[4] The results of the 2000 Census also indicated that the number of Virginia seats in the U.S. House of Representatives would remain unchanged.

3. On February 21, 2003, more than a year after the plan took effect and three months after the 2002 congressional elections, the Petitioners filed this lawsuit in the United States District Court for the Eastern District of Virginia. Specifically, the Petitioners alleged that the redrawn Fourth Congressional District violated § 2 of the Voting Rights Act by diluting their ability to elect their candidate of choice. *See Pet.* at 3. The Petitioners conceded, as they must, that it is simply impossible to draw the lines so that African-Americans constitute a majority in both the Third and Fourth Congressional Districts. *See Pet.* at 6; *App.* at 26a-27a. Nevertheless, the Petitioners asked the district court to order Virginia to repeat the redistricting process and increase the African-American population in the Fourth Congressional District to 40%, a level at which the Petitioners believe that African-Americans could elect their candidate of choice with the assistance of non-African-American voters. *See Pet.* at 4; *App.* at 26a, 27a, 33a.

Although the Petitioners explicitly asserted an "ability to elect" claim, *see Pet.* at 4, they based their argument for their requested relief on the potential viability of an "ability to influence" claim. In an "ability to influence" claim, the Petitioners argued, the minority voters, though too small to constitute a majority and thus elect their candidate, should be excused from the first *Gingles* pre-condition because they are "large enough to influence the selection of candidates." *App.* at 34a. The Petitioners' argument was two-fold. First, they contended that this Court has left open the issue of whether a vote dilution claim could be brought under such an "ability to influence" claim. Second, assuming that this Court has left open the question of an "ability to influence" claim, the Petitioners

argued that they should be excused from the first *Gingles* precondition on their "ability to elect" claim. *See App.* at 43a.

The district court dismissed the Petitioners' entire case under § 2 of the Voting Rights Act.[5] The court recognized that, under this Court's precedents of *Gingles* and *Johnson*, "a § 2 plaintiff must demonstrate that it is possible to create additional geographically compact majority-minority districts." *App.* at 32a. Since the Petitioners admitted that African-Americans could not constitute a majority in the Fourth Congressional District, the district court dismissed their complaint for failing to meet this necessary precondition to all VRA § 2 claims. *See App.* at 32a. With regard to the Petitioners' argument concerning "ability to influence" claims, the district court found that "[a]ll five Circuit Courts of Appeal that have considered the question of an 'influence district' have held that the first precondition in *Gingles* establishes a bright line that precludes vote dilution claims in other than so called majority-minority districts." *App.* at 43a. Since no circuit court had even affirmed the viability of an "ability to influence" claim, the district court correctly applied the "well established and objective rule requiring a majority-minority district" to the Petitioners' "ability to elect" claim. *App.* at 44a.

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[5] As an initial matter, the district court correctly found that seven of the nine Petitioners no longer resided in the Fourth Congressional District and so lacked standing to challenge its composition under the Voting Rights Act. Specifically, the district court dismissed Petitioners Richard Pruitt, Thomasina Pruitt, Vivian Curry, Elijah Sharpe, Eunice McMillan, James Speller, and Robbie Garnes.

4. On appeal, the Petitioners acknowledged the *Gingles* precondition mandating that § 2 plaintiffs demonstrate that a minority group is large enough to form a majority in the challenged district. Nevertheless, they contended that the first *Gingles* precondition is satisfied not only when a minority group constitutes a numerical majority in a single-member district, but also when minorities are sufficiently numerous to form an "effective" or "functional" majority by combining with voters from other racial or ethnic groups. *See App.* at 9a.

The Fourth Circuit rejected Petitioners' argument. The court, in an opinion written by Judge Duncan, ruled that, under *Gingles* and § 2, minority voters must have the ability to elect their candidates on the strength of their *own* ballots. Where, as here, minorities cannot constitute a majority, they have no ability to elect the candidates of their own choice and thus have no claim under § 2. *See App.* at 13a-14a. The court noted that *Gingles* addressed minority voters' "ability to elect" their preferred candidates and did not address an "ability to influence" claim. *See App.* at 11a. Because the Petitioners could not establish that African-American voters in the Fourth Congressional District could form a majority as required by *Gingles*, the Fourth Circuit affirmed the district court's order dismissing the § 2 claim.[6] *See App.* at 19a.

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[6] The Fourth Circuit also declined to reverse the district court's ruling that seven Petitioners lacked standing. *See App.* at 10a. Since the Petitioners have not raised this ruling in their Petition, that issue is not before this Court.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, regardless of how it is characterized, the Petitioners' theory is inconsistent with this Court's decisions as well as the text and purpose of § 2. Allowing the Petitioners to bring a § 2 claim when they do not form a majority in a single-member district is inconsistent with this Court's previous decisions. This Court has held that, in order to bring a § 2 claim under the "ability to elect" theory, minority voters must constitute a majority in a single-member district. In subsequent decisions addressing both the "ability to elect" and the "ability to influence" theory, this Court never excused minority votes from this requirement. Moreover, any theory that allows minority voters to pursue a § 2 claim when they do not constitute a majority in a single-member district is inconsistent with the text and purpose of § 2.

Second, there is no split among the Circuits. When confronted with a situation where minority voters cannot constitute a majority in a single district, every Circuit to address the issue has ruled that the minority voters may not maintain a § 2 claim. Although the First Circuit did suggest that it might be possible for minority voters to maintain such a claim, nothing in the First Circuit's decision expressly held that. To the contrary, the First Circuit simply held that, in some instances, there should be further factual development before applying the *Gingles* preconditions.

I. THE PETITIONERS' THEORY IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE AS WELL AS THE TEXT AND PURPOSE OF § 2.

As explained above, although the Petitioners appear to bring an "ability to influence" claim, the Petitioners insist that they are bringing a "coalitional majority ability to elect" claim. Yet, regardless of how one characterizes Petitioners' theory, it is clear that they are attempting to bring a § 2 claim even though minority voters do not constitute a majority in a single-member district. Allowing the Petitioners to bring a § 2 claim when they do not form a majority in a single-member district is inconsistent with this Court's previous decisions. This Court has held that, in order to bring a § 2 claim under the "ability to elect" theory, minority voters must constitute a majority in a single-member district. In subsequent decisions addressing both the "ability to elect" and the "ability to influence" theory, this Court never excused minority votes from this requirement. Moreover, any theory that allows minority voters to pursue a § 2 claim when they do not constitute a majority in a single-member district is inconsistent with the text and purpose of § 2.

A. To Bring a § 2 Claim Under the "Ability To Elect" Theory, Minority Voters Must Constitute a Majority in a Single-Member District.

In *Gingles*, this Court laid down three "necessary preconditions" that minority voters must demonstrate before they can pursue a claim under § 2. Only the first such precondition is relevant here: "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The

Court's rationale for this first precondition stems from the text of § 2, which recognizes a violation only when minorities have "less opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). Thus, *Gingles* expressly held that minority voters cannot state a claim under § 2 if they cannot constitute a majority in a single-member district. This Court reaffirmed this rule in *Growe v. Emison*, 507 U.S. 25, 40 (1993) ("[T]he three *Gingles* prerequisites continue to apply . . . [and] are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.").

B. This Court Has Never Excused Minority Voters from the Requirement That They Constitute a Majority in a Single-Member District.

Although *Gingles* was an "ability to elect" case, this Court has never excused minority voters – even those attempting to assert an "ability to influence" claim – from the requirement that they constitute a majority in a single-member district. Indeed, this Court has never ruled that such an "ability to influence" claim is viable, much less that minority voters asserting such a claim are excused from the requirement that minority voters constitute a majority in a single-member district.

In *Gingles*, this Court limited its holding to "ability to elect" claims and refused to comment on "ability to influence" claims. "We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections." 478 U.S.

at 46 n.12 (emphasis added). Similarly, in *Growe*, this Court explained that "*Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability *to influence*, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. We do not reach that question in the present case either." 507 U.S. at 41 (emphasis added) (internal citation omitted).

In *Voinovich*, minority voters challenged an Ohio redistricting plan under § 2, claiming it deprived them of "influence districts." *Voinovich,* 507 U.S. at 154. This Court defined an influence district as one in which minorities, though too small to constitute a majority in the district, "could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters." *Id.* Once again, this Court refused to decide whether such "ability to influence" claims are viable under § 2. "Instead, we assume for the purpose of resolving this case that [minority voters] in fact have stated a cognizable § 2 claim." *Id.* This Court did not rule on this issue because the minority voters' case failed under the third *Gingles* precondition. "We need not decide how *Gingles*' first factor might apply here, however, because [minority voters] have failed to demonstrate *Gingles*' third precondition. . . ." *Id.* at 158. Because the minority voters' "ability to influence" claim failed under the third *Gingles* precondition, this Court did not decide whether it met the first precondition or whether an "ability to influence" claim is even cognizable.

Finally, *Johnson* involved an appeal of the federal district court's ruling on a minority voters' § 2 challenge to a redistricting plan. *Johnson*, 512 U.S. at 1002. The district

court found that the minority voters' "ability to influence" claim satisfied the three *Gingles* preconditions. The district court then turned to the merits of the § 2 claim and found that, based on the totality of the circumstances, Hispanics continued to feel the political effects of historic discrimination. Accordingly, the district court found that the redistricting plan violated § 2. *Id.* at 1004. On appeal, this Court faced two issues. The first issue was "whether the first *Gingles* condition can be satisfied by proof that a so-called influence district may be created." *Id.* at 1009. Again, this Court refused to reach this issue. "As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases." *Id.* Instead, this Court reached the second issue and decided the case based on its finding that "the totality of circumstances appears not to support a finding of vote dilution here. . . ." *Id.* at 1024. Having decided the case on the merits, this Court again had no occasion to rule on the viability of an "ability to influence" claim under § 2.

In short, this Court has never ruled that an "ability to influence" claim is even legally cognizable; much less that minority voters asserting such a claim are excused from the first *Gingles* precondition. By asking this Court to take both unprecedented steps here, the Petitioners are effectively asking this Court to rewrite its § 2 jurisprudence.

C. The Statutory Text Forecloses the Petitioners' Theory.

The text of the statute also forecloses the Petitioners' theory. A violation of the Voting Rights Act occurs only if a

political process causes racial minorities to have "less opportunity than other members of the electorate to participate in the political process and to *elect* representatives of their choice." 42 U.S.C. § 1973 (emphasis added). Thus, the statute explicitly protects the minority voters ability "to elect" *without help from other racial groups*, but makes no mention at all of the ability to elect with *the help of other racial groups*. This crucial textual distinction was the basis for the requirement that, before they may bring a § 2 claim, minority voters must constitute a majority in a single-member district. As this Court observed:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50 n.17 (emphasis original).

The essence of a claim under § 2 is dilution of minority votes. *See White v. Regester*, 412 U.S. 755, 765 (1973). Any claim of dilution must be measured against some reasonable benchmark of "undiluted" minority voting strength. *See App.* at 10a-12a. The text of § 2 sets that benchmark at the level at which minorities have the ability "*to elect* representatives of their choice." 42 U.S.C. § 1973 (emphasis added). In *Gingles*, this Court interpreted that benchmark to be the point at which minorities comprise at least 50%. "Where the minority group meets these requirements, the representative that it could *elect* in the hypothetical district or districts in which it constitutes a

majority will serve as the measure of its undiluted voting strength." *Id.* at 90-91 (O'Connor, J., concurring) (emphasis added). In other words, minorities must have the potential to elect candidates on the strength of their own ballots. *See App.* at 13a. The text of § 2 is therefore incompatible with any claim in which African-Americans must rely on non-African-American crossover voters to elect their candidates of choice.

D. The Petitioners' Theory Is Inconsistent with the Purpose of the Voting Rights Act.

The Petitioners' theory also is inconsistent with the purpose of the Voting Rights Act. Quite simply, § 2 is aimed at ensuring equality of opportunity rather than at guaranteeing the electoral success of particular candidates. *See Johnson,* 512 U.S at 1014. The objective of § 2 is not to ensure that a candidate supported by minority voters and their political allies can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, because of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich,* 507 U.S. at 153. Section 2 is not violated unless minorities "have less opportunity *than other members of the electorate* to . . . elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis supplied). The Circuits to address the issue have held that the purpose of the act is to protect the votes of racial minorities, not the success of any particular candidates or political coalitions. *See Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996).

In sum, the Petitioners' theory is inconsistent with this Court's decisions and with the text and purpose of the Voting Rights Act. Accordingly, certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

Contrary to the Petitioners' assertions, there is no conflict among the Circuits. Every Circuit to address the issue has concluded that, when minority voters cannot constitute a majority in a single-member district, the minority voters may not maintain a § 2 claim. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-52 (5th Cir. 1999); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988). Moreover, every three-judge panel to address the issue has reached the same conclusion. *See Session v. Perry*, 298 F. Supp. 2d 451, 478-79, 486 (E.D. Tex.) (three-judge court), *vacated on other grounds*, 125 S. Ct. 351 (2004); *Parker*, 263 F. Supp. 2d at 1104-05; *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court), *summarily aff'd*, 537 U.S. 997 (2002); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 n.22 (D.S.C. 2002) (three-judge court); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (three-judge court), *aff'd*, 123 S. Ct. 851 (2003); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) (three-judge court), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *Turner v. Arkansas*, 784 F. Supp. 553, 565, 570-71 (E.D. Ark. 1991) (three-judge court), *aff'd*, 404 U.S. 952 (1992).

Nevertheless, the Petitioners insist that there is a Circuit split. *See Pet.* at 12.[7] Specifically, the Petitioners claim that the First Circuit's *per curiam* decision in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*) (*per curiam*) stands for the proposition that minority voters may maintain a § 2 claim even though it is impossible for them to constitute a majority in a single district. Quite simply, the Petitioners overstate *Metts*. They seek to transform a casual observation into a formal holding.

Metts involved a § 2 challenge to a Rhode Island state senate district in which 21% of the total population was African-American and 46% was Hispanic. The district court dismissed the complaint for failure to comply with the *Gingles* preconditions. *Id.* at 9. On appeal, the First Circuit did suggest that the Supreme Court has not conclusively ruled "whether dilution of a minority racial group's influence, as opposed to the power to elect, could violate section 2 – a position that would require substantial modification of *Gingles*' first-prong 'majority' precondition." *Id.* at 11.

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[7] None of the district court cases Petitioners cite support their "ability to influence" claim. *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (three-judge court), was overruled in *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998). *West v. Clinton*, 786 F. Supp. 803 (W.D. Ark. 1992), assumed, without deciding, that the "ability to influence" theory was viable. The district court ultimately rejected the minority voters' claim because the minority voters failed to present evidence that, even under an "ability to influence" theory, their candidate would be elected. *Id.* at 807. Both *Puerto Rican Legal Def. and Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992), and *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Cal. 2002) involved districts in which minorities were a majority.

However, the court of appeals focused on the lack of evidence concerning the totality of circumstances surrounding the redistricting plan. As the First Circuit observed:

> At this point we know practically nothing about the motive for the change in district or the selection of the present configuration, the contours of the district chosen or the feasible alternative, the impact of alternative districts on other minorities, or anything else that would help gauge how mechanically or flexibly the *Gingles* factors should be applied.

Id. at 12. Faced with this uncertainty, the First Circuit sought more information concerning both the facts of the case and the governing law. Accordingly, the court of appeals remanded the case to the district court "to allow a fuller development of the evidence, and further legal analysis based on that evidence, before any final determination is made." *Id.* at 10. In other words, *Metts* does not support the proposition that compliance with the *Gingles* preconditions is excused. Rather, *Metts* stands for the proposition that, in some instances, it is necessary to develop the record more fully before determining if the minority voters state a claim.[8]

In short, there is no split in the Circuits. Every Circuit to explicitly rule on the issue has concluded that any claim under § 2 – whether it be an "ability to elect" or an "ability to influence" claim – is subject to the requirement that

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[8] In this respect, the First Circuit's decision is simply wrong. The *Gingles* preconditions act as a sentry at the gates – a bright-line rule that must be satisfied *before* the totality of circumstances comes into play. *See Growe*, 507 U.S. at 38-40; *Johnson*, 512 U.S. at 1006-09.

minority voters must constitute a majority in a single-member district. Accordingly, Certiorari should be denied.

CONCLUSION

For the reasons set out above, this Court should **DENY** the Petition for a Writ of Certiorari.

Respectfully submitted,

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JOAN HALL, *et al.*,

Petitioners

v.

COMMONWEALTH OF VIRGINIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents concede that this Court has never decided specifically whether minority plaintiffs are prohibited from bringing a claim under Section 2 of the Voting Rights Act ("Act"), 42 U.S.C. § 1973(b), when they allege they have the ability to "elect representatives of their own choice" in a single-member district, but do not allege their minority group constitutes an arithmetical majority in the district. IR Br. in Opp. at 5; CR Br. in Opp. at 13-15.[1] While asserting that most courts have barred "ability-to-elect" district claims under Section 2, Respondents concede that some Circuit and district courts have permitted such claims. IR Br. in Opp. at 10; CR Br. in Opp. at 19. They also concede that the United States' most recent brief on this issue to this Court recommended that the Court grant review to settle this dispute. IR Br. in Opp. at 15. These concessions justify a grant of review.

Respondents argue that *certiorari* should be denied because "overwhelming precedent" dooms "influence district" claims. But as the Fourth Circuit recognized below, Petitioners have alleged an ability-to-elect district claim, not an influence district claim. Respondents' statutory arguments fail to address this Court's broad construction of the term "elect" in Section 2, which comports with the totality of the circumstances inquiry mandated by Congress. And permitting ability-to-elect claims will remedy actual vote dilution that hurts minority voters.

The Court should grant review to resolve this important issue that will affect voting districts nationwide.

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[1] "IR Br. in Opp." is the opposition brief filed by the individual Respondents. "CR Br. in Opp." is the opposition brief filed by the Commonwealth Respondents.

A. There Is An Ongoing Circuit And District Court Split Whether Ability-To-Elect Claims – Which Are Different Than Influence District Claims – Are Prohibited Under Section 2.

1. If Petitioners' case had arisen in Rhode Island, it would have been decided on its merits. The First Circuit would not have affirmed a Federal Rule of Civil Procedure 12(b)(6) dismissal of Petitioners' ability-to-elect claim by the lower court, as the Fourth Circuit did. Instead, it would have permitted the case to advance into discovery. *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*). Respondents argue that *Metts* was wrongly decided and that the Fourth Circuit was correct in dismissing Petitioners' claim. IR Br. in Opp. at 10, 22, 24; CR. Br. in Opp. at 20 n.8. Respondents hence implicitly acknowledge a Circuit split on whether Section 2 bars ability-to-elect district claims.[2]

Respondents' attempt to sweep away all the district court cases that favor ability-to-elect district claims, *see* IR Br. in Opp. at 9, CR Br. in Opp. at 19 n.7, fails to address the core teaching of these cases: that a mechanical 50% cutoff to determine whether a minority group has the ability to elect is inappropriate, given the fact-intensive inquiry required by Section 2. Petition at 14-15. Petitioners readily admit that other district court cases have rejected ability-to-elect district claims. *Id.* at 14-16. These splits in reasoning among Circuit and district courts are why the Court should grant review.

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[2] Contrary to Respondents' contention, IR Br. in Opp. at 7, neither the Ninth Circuit nor the Eleventh Circuit has ruled that Section 2 bars all ability-to-elect claims. The Ninth Circuit has stated in dictum that when candidates are elected by a plurality, an ability-to-elect claim might be cognizable. *See Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989). The Eleventh Circuit has explicitly left the issue open: "We leave open the question of whether a section 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e. a claim where members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote." *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004) (internal quotation marks, citation omitted).

2. Respondents claim "the Court should not attach talismanic significance to whether Petitioners' claim is labeled with the 'influence' or 'ability-to-elect' terminology." IR Br. in Opp. at 5 n.2. But *Georgia v. Ashcroft*, 539 U.S. 461 (2003), drew just this distinction between ability-to-elect/"coalitional" districts and influence districts. *Id.* at 480 (majority op.), 492-93 (Souter, J., dissenting); *see* Petition at 4 n.4. And the Fourth Circuit analyzed Petitioners' claim as an ability-to-elect claim below, stating that "[b]ecause the complaint does not raise an influence dilution claim, we do not consider the question here." App. at 11a n.11.

The two types of claims are different. An influence district claim asserts that the minority group can only influence election results, not elect its candidate of choice. By contrast, an ability-to-elect district claim requires plaintiffs first to allege, and then to prove, that they have the power to elect their candidate of choice. Petition at 4 n.4. Whether or not the Act protects the ability of a minority group to influence elections, the Act is plainly designed to clear obstacles that hinder minority groups which otherwise would have the power to elect. Ability-to-elect district claims fall squarely within the scope of Section 2 and *Thornburg v. Gingles*, 478 U.S. 30 (1986). Respondents wrongly conflate these two types of claims.[3]

Accordingly, Respondents' claim that "overwhelming precedent" weighs against granting review, *see* IR Br. in Opp. at 6-9, is incorrect, since most of the cases they cite concern influence district claims.[4] Other cases they cite do not explicitly discuss ability-to-elect district claims and

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[3] Respondents assert that ability-to-elect district claims are "less viable" than influence district claims. IR Br. in Opp. at 5 n.2. But *Gingles* and later cases decided by this Court explicitly reserve whether Section 2 bars ability-to-elect district claims. Petition at 10-12.

[4] Also not at issue are "minority coalition" claims, where two different minority groups are combined for purposes of *Gingles*' first prong. *See Growe v. Emison*, 507 U.S. 25, 41 (1993); *Nixon v. Kent County*, 76 F.3d 1381, 1389 (6th Cir. 1996) (*en banc*). Petitioners allege that they have the ability to elect their candidate of choice without help from another minority group. App. at 50a.

thus have little or no precedential value. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

3. The United States stated in its most recent submission to the Court on this issue that:

> [t]he application of the 50% rule by the court of appeals, moreover, raises a recurring issue of considerable importance to the administration of Section 2. The question whether Section 2 plaintiffs claiming vote dilution must invariably show that the minority would constitute a majority of a single-member district has been raised, and continues to be raised, in numerous cases and should be definitively resolved by this Court.

Brief for the United States as *Amicus Curiae*, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, No. 98-1987 (Dec. 17, 1999) ("*Valdespino* Amicus Brief"), at 14. Five years have passed since the Court denied *certiorari* in *Valdespino*, and the United States has been proven right: the issue has arisen in more and more cases, and courts have rendered conflicting decisions whether Section 2 bars ability-to-elect district claims. *See* Petition at 17. The Court should address this issue now.

B. Respondents' Interpretation Of Section 2 Is At Odds With The Statute's Plain Meaning And This Court's Cases.

1. Respondents disparage ability-to-elect district claims using the following thread of reasoning: less-than-50% minority groups lack the power to "elect" under Section 2; that means ability-to-elect district claims must necessarily protect biracial coalitions joined only by politics, not minority groups; and since Section 2 only protects minority groups, no ability-to-elect district claims are possible. IR Br. in Opp. at 16-19. But this thread unravels almost immediately because this Court has already stated that less-than-50% minority groups have the power to "elect" under Section 2. That implies strongly that ability-to-elect district claims are permitted under Section 2.

For instance, in *Georgia* – a case ignored by Respondents when they construe Section 2 – both the majority and dissenting opinions state that minority voters can possess the ability to "elect" candidates of their choice, even if they do not constitute a majority in that district. 539 U.S. at 480 (majority op.), 492-93 (Souter, J., dissenting). Other Supreme Court cases are in accord.[5] Petition at 20 (citing cases). The United States also recognizes that less-than-50% minority groups can have the power to elect candidates of their choice. *Valdespino* Amicus Br., *supra*, at 10-11.[6] And district courts have found that less-than-50% minority groups can be often an "effective majority." *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1302, 1307, 1315, 1322 (S.D. Fla. 2002) (Congressional districts with greater than a 46% African-American voting age population, and a state house district with a 42% African-American voting age population, afforded African-American voters a reasonable opportunity to elect candidates of choice).

Respondents argue that an over-50% rule is necessary to ensure minority group members can "dictate [electoral] outcomes independently." IR Br. in Opp. at 17 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993)). But "dictating [electoral] outcomes independently" is not the standard for the first *Gingles* prong; rather, the standard is whether the minority group – of whatever size – has the "ability to elect." *See Voinovich*, 507 U.S. at 158; *Gingles*,

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[5] Respondents badly misread Justice O'Connor's concurrence in *Gingles*. IR Br. in Opp. at 25-26. Her initial criticism of the standard created by the *Gingles* majority has been superseded by the Court's repeated approvals of *Gingles*. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146 (1993); *Johnson v. De Grandy*, 512 U.S. 997 (1994). This, however, does not diminish the force of her observation that under the *Gingles* majority opinion, a minority group which does not constitute an arithmetical majority in a district nonetheless may have the ability to "elect" candidates of its choice. *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring); *see* Petition at 10.

[6] Respondents inexplicably assert that the Court's denial of certiorari in *Valdespino* has significance. *See* IR Br. in Opp. at 15. It is settled law that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

478 U.S. at 46 n.12 (majority op.), 90 n.1 (O'Connor, J., concurring). The sentence in *Voinovich* that follows the above-quoted excerpt confirms this: "*But* [*African-American voters*] *could elect their candidate of choice* nonetheless if they are numerous enough and their candidate attracts sufficient cross-over voters from white voters." *Voinovich*, 507 U.S. at 154 (emphasis added).[7]

Respondents would throw Section 2 vote dilution plaintiffs out of court without any opportunity to present evidence if the minority group constituted 49.9% of the relevant population in an illustrative district, even if it could demonstrate that it had the power to elect (with or without white crossover voters). This Procrustean approach is contrary to the fact-specific inquiry mandated by Section 2 and embraced by this Court. *See Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("No single statistic provides courts with a shortcut to determine whether a [redistricting plan] unlawfully dilutes minority voting strength.").

2. Respondents claim that for ability-to-elect district claims, district courts will be unable to determine "which of two [redistricting] plans will elect more minority-preferred candidates" because they will have to exercise "political judgment[]." IR Br. in Opp. at 20, 21. But Congress wanted district courts to conduct a "searching practical evaluation of 'the past and present reality'" to determine whether Section 2 has been violated. *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 28-30). District courts already decide complex issues under Section 2, such as whether racial bloc voting exists, whether political cohesion is present, and whether the totality of the circumstances shows vote dilution. These issues inherently require political judgment. *See, e.g., Old Person v. Brown*, 312 F.3d 1036, 1052 (9th Cir. 2002) (Noonan, J., concurring) ("To be sure, judgment as to superiority or inferiority

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[7] Respondents cite the United States' amicus brief in *Voinovich* as supporting their position *prohibiting* ability-to-elect claims without acknowledging that the United States filed briefs in at least four other cases *supporting* ability-to-elect claims. Petition at 25-26 (listing briefs).

[of a minority-preferred candidate] would require a political judgment from the judge; but so do the other factors the judge is required to consider [under Section 2]."); *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) (citations omitted) (Section 2 claims inherently "require[] close analysis of unusually complex factual patterns . . . [with] the potential for serious interference with state functions. . . .").

Moreover, this Court in *Georgia* required a district court in cases arising under Section 5 of the Act to measure the impact of ability-to-elect districts on the ability of minorities to "effectively exercise" the "electoral franchise." *See* 539 U.S. at 479-80. To perform this task requires the same pragmatic, fact-sensitive judicial skills that are necessary to determine under Section 2 of the Act whether a less-than-50% minority group has the ability to elect its candidate of choice. *See id.* at 479-80 (majority op.), 485-90 (Souter, J., dissenting). Respondents' distrust of the capabilities of district courts is unwarranted.

C. This Case Is An Ideal Vehicle To Demonstrate That Ability-To-Elect District Claims Are Necessary To Combat Vote Dilution.

1. Ability-to-elect district claims are necessary to fight real dangers to minority group members' ability to participate as equals in American political life. Here, Petitioners allege that African-American voting strength was diluted when, in drawing Congressional districts in 2001, the Commonwealth Respondents "packed" certain African-Americans in one district and "cracked" a nearby African-American population into two other districts. Packing and cracking have long been recognized as techniques that dilute minority voting strength. *Voinovich,* 507 U.S. at 153-54.

Under the new district lines, African-Americans have the potential to elect a candidate of choice in only the "packed" Congressional district. *See* App. at 49a, 51a, 53a. That means that they likely can elect a candidate of choice in only 1 of Virginia's 11 Congressional districts (9%), even

though African-Americans are approximately 20% of Virginia's population. *Compare* http://dlsgis.state.va.us/congress/HB18Enrolled/HB18Enrolled.htm with http://www.census.gov/census2000/states/va.html. This large disproportionality is some evidence – not conclusive evidence, but some evidence – of unequal political and electoral opportunity. *De Grandy*, 512 U.S. at 1025 (O'Connor, J. concurring) ("Lack of proportionality is probative evidence of vote dilution.").

2. Permitting ability-to-elect claims does not create a "virtually irrebuttable mandate for proportional representation." *Cf.* IR Br. in Opp. at 12, 25-26. To start with, Petitioners' position does not eliminate the first *Gingles* prong, as Respondents claim. Like a standing requirement, the first *Gingles* prong ensures that minority voters suffered actual harm from the challenged electoral structure and that a remedy is available. *See Growe v. Emison*, 507 U.S. 25, 28 (1993). For ability-to-elect district claims, plaintiffs must show that they lost their ability to elect a candidate of their choice (harm) and that an alternative plan would give them the ability to elect their candidate of choice (remedy). Minority group plaintiffs who bring ability-to-elect claims must prove their ability to elect through statistical evidence, expert analysis, and "other political and demographic facts."[8] *Georgia*, 539 U.S. at 493 (Souter, J., dissenting). Respondents ignore how difficult it would be for plaintiffs to make these showings to avoid summary judgment or at trial.

And plaintiffs must still prove the other two *Gingles* factors and that, in the totality of circumstances, they do not have an equal opportunity to participate in the electoral process and elect their candidate of choice. Making

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[8] Respondents complain that because Petitioners did not specifically allege every fact affecting their ability to elect a candidate of their choice, or that they lacked full political opportunity, this case is a "poor vehicle" to address Petitioners' claims. IR Br. in Opp. at 13, 15. Yet both the Fourth Circuit and the district court dismissed Petitioners' complaint solely for failure to meet a rigid 50% standard supposedly required by the first *Gingles* prong, not for any other claimed deficiency.

these showings is also difficult. There are cases where minority group plaintiffs have proven the three *Gingles* factors, yet the district court found no Section 2 violation because the totality of the circumstances weighed against the plaintiffs. *See, e.g., Old Person*, 312 F.3d at 1049-50; *NAACP v. Fordice*, 252 F.3d 361, 373-74 (5th Cir. 2001). Whatever "mandate" Respondents believe might exist is not "virtually irrebuttable."

In any event, this Court made plain in *De Grandy* that "proportionality"[9] (the relationship between the number of districts where a minority group has the ability to elect and the minority's group's population share) is not an improper goal. *See* 512 U.S. at 1020. Respondents' seeming criticism of this "rough proportionality," *see* IR Br. in Opp. at 27, is unfounded.

3. Respondents suggest that the first *Gingles* prong be interpreted rigidly to avoid "penalizing" jurisdictions where voting is less racially polarized. IR Br. in Opp. at 24. Their implicit assumption is that vote dilution can only be found where there is *no* white crossover voting at all. *Gingles* shows this argument is wrong. *See* 478 U.S. at 59 (finding vote dilution where white crossover voting for African-American candidates ranged from 8% to 50% in primary elections and from 28% to 49% in general elections). "Lower courts reviewing Section 2 claims have generally concluded, however, that a small but consistent amount of crossover voting does not defeat a finding of racially polarized or bloc voting." *Valdespino* Amicus Br., *supra*, at 12 n.3 (citing numerous Circuit cases).

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[9] This is different from "proportional representation," which is the relationship of the number of elected minority representatives to the minority group's population share. *See De Grandy*, 512 U.S. at 1014 n.11. Respondents' use of this term to describe the supposed result of ability-to-elect district claims is highly misleading. Petitioners do not seek proportional representation. Even by Respondents' flawed reasoning, ability-to-elect claims would result in proportionality, not "proportional representation."

Moreover, allowing plaintiffs whose voting strength is diluted to bring a claim even if they constitute less than an arithmetical majority in a district would not subvert the interests of one minority group to another. That was not the case in the First Circuit case of *Metts*,[10] and it was not the case here. In both cases, the plaintiffs sought to avoid illegal vote dilution by demonstrating that an alternative districting plan would give them an opportunity to participate fully in the political process and elect their candidate of choice. They were not seeking a "trade-off" between competing minority groups.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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[10] Respondents claim Hispanics were hurt by the settlement in the First Circuit *Metts* case of the ability-to-elect claim brought by African-Americans. IR Br. in Opp. at 22. But before the settlement, one Hispanic state senator (Juan Pichardo) had been elected in 2002. After the settlement, Senator Pichardo was reelected in 2004, and an African-American state senator (Harold Metts) was also elected in 2004. *Compare* http://www.elections.ri.gov/2002GE/RIsenatetotals.htm *with* http://www.elections.ri.gov/2004GE/SenateDis2.htm, http://www.elections.ri.gov/2004GE/SenateDis6.htm. Hispanics were not harmed by the *Metts* plaintiffs' ability-to-elect claim.